



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

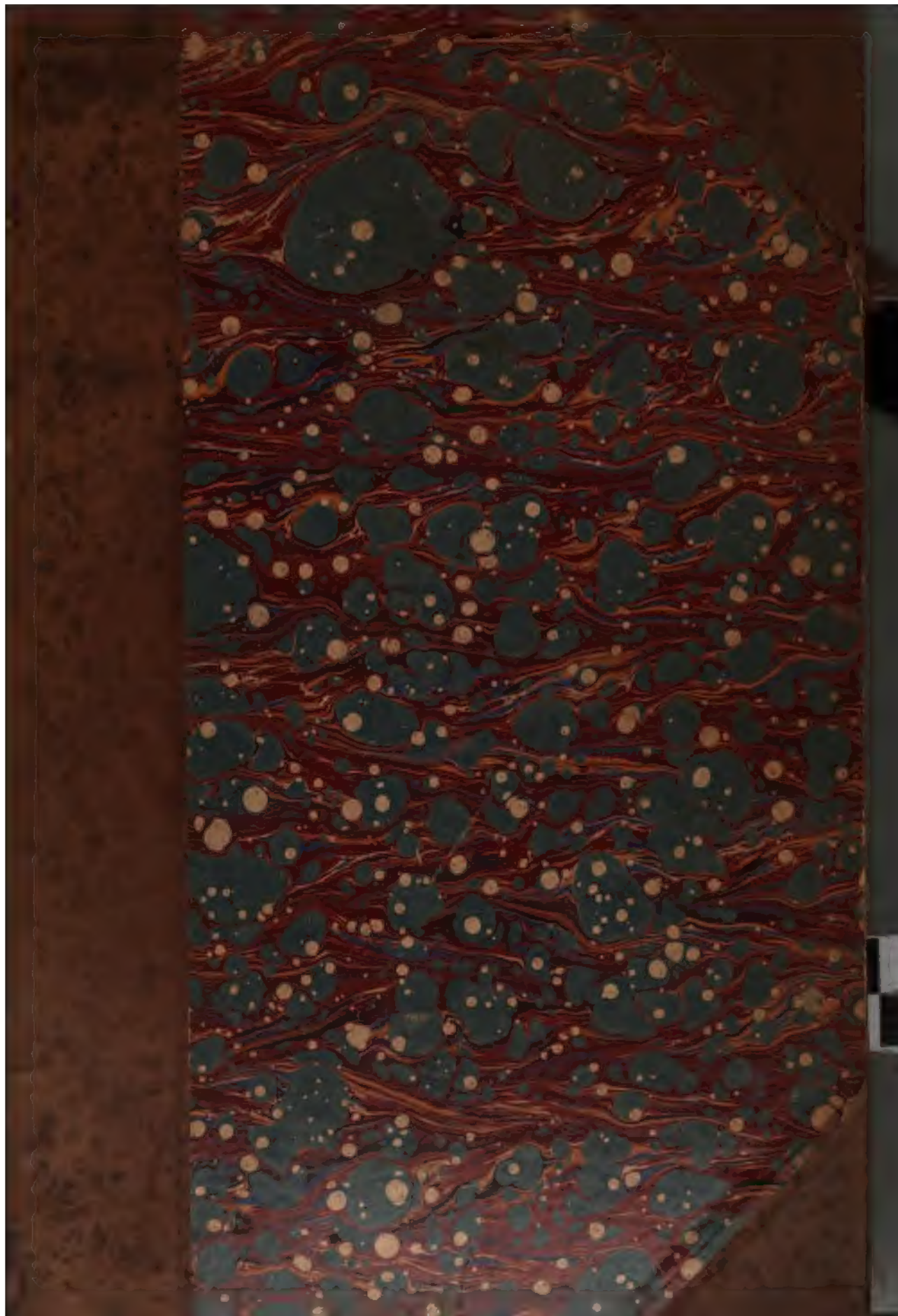
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



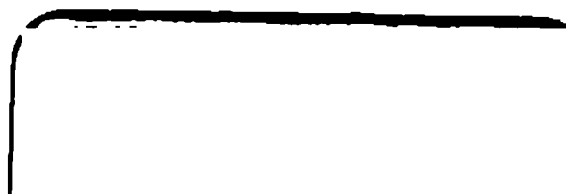




Cus. UK

Section

C 45



Stewart & Burns.

Solicitors

Inverness











*Stewart Rule & Burns*

REPORTS OF CASES

BEFORE

THE HIGH COURT

AND

CIRCUIT COURTS OF JUSTICIARY  
IN SCOTLAND,

FROM MAY 1882 TO DECEMBER 1885.

BY

CHARLES TENNANT COUPER,  
ADVOCATE.

VOL. V.

EDINBURGH:  
T. & T. CLARK, LAW BOOKSELLERS,  
38 GEORGE STREET.

MDCCCLXXXVII.





PRINTED BY TURNBULL AND SPEARS

FOR

<i>T. &amp; T. Clark,</i>	-	-	-	<i>Edinburgh.</i>
<i>Stevens &amp; Sons,</i>	-	-	-	<i>London.</i>
<i>Stevens &amp; Haynes,</i>	-	-	-	<i>London.</i>
<i>J. Smith &amp; Sons,</i>	-	-	-	<i>Glasgow.</i>

**JUDGES**  
**OF THE**  
**COURT OF JUSTICIARY**

**DURING THE PERIOD OF THESE REPORTS.**

---

**LORD JUSTICE-GENERAL.**

**1867. THE RIGHT HONOURABLE JOHN INGLIS.**

**LORD JUSTICE-CLERK.**

**1869. THE RIGHT HONOURABLE LORD MONCREIFF OF TULLIE-  
BOLE.**

**LORDS COMMISSIONERS OF JUSTICIARY.**

**1854. SIR GEORGE DEAS, LORD DEAS.**

**1874. THE RIGHT HONOURABLE GEORGE YOUNG, LORD  
YOUNG.**

**1874. DAVID MURE, LORD MURE.**

**1876. JOHN MILLER, LORD CRAIGHILL.**

**1876. JAMES ADAM, LORD ADAM.**

**1885. JOHN M'LAREN, LORD M'LAREN.**

**LORDS ADVOCATE.**

**1880. JOHN M'LAREN.**

**1881. THE RIGHT HONOURABLE JOHN BLAIR BALFOUR.**

**1885. THE RIGHT HONOURABLE JOHN HAY ATHOL MAC-  
DONALD.**

**SOLICITORS GENERAL.**

**1876. THE RIGHT HONOURABLE JOHN HAY ATHOL MAC-  
DONALD.**

**1880. THE RIGHT HONOURABLE JOHN BLAIR BALFOUR.**

**1881. ALEXANDER ASHER.**

**1885. JAMES PATRICK BANNERMAN ROBERTSON.**



**ADVOCATES DEPUTE.**

1877. ALEXANDER BLAIR.  
1880. DAVID BRAND.  
1881. ÆNEAS JAMES GEORGE MACKAY.  
1881. ALEXANDER TAYLOR INNES.  
1882. RICHARD VARY CAMPBELL.  
1885. JOHN ALEXANDER REID.  
1885. JOHN RANKINE.  
1885. DUGALD M'KECHNIE.  
1885. JAMES WALLACE.

**CROWN AGENTS.**

1866. CHARLES MORTON.  
1874. JAMES AULDJO JAMIESON.  
1883. CHARLES B. LOGAN.

## P R E F A C E.

THE present Reporter's connection with the Justiciary Reports comes to an end with the completion of this, the fifth, volume of the series bearing his name. He has endeavoured, in continuation of the able reports of his predecessors, to render the series a complete and accurate record of all the important legal questions which have arisen in the High Court and Circuit Courts of Justiciary in Scotland since the year 1867, and he desires to tender his warmest acknowledgments and most cordial thanks to the Judges of the Court of Justiciary, the Lords Advocate, Solicitors-General, Crown Counsel, and to his brethren at the bar who have been engaged in justiciary practice, for the facilities and assistance they have at all times so readily accorded to him. He has also to acknowledge much valuable assistance in the preparation of some of the concluding reports, and of the index to the present volume, received from Mr James Cathcart White, Advocate, under whose able Editorship the series will in future be continued.



# INDEX OF NAMES

TO

VOL. V.

	PAGE
Allison v. Balmain, High Court, Oct. 25, 1882, -	Appeal, - 137
Anderson, Dalglish and Kerr v., High Court, Feb. 22, 1883, -	Appeal, - 221
Armitage, George, Glasgow, Oct. 28, 1885, -	Culp. Hom., - 675
Auld, Campbell v., High Court, Oct. 27, 1882, -	Appeal, - 152
Balmain, Allison v., High Court, Oct. 25, 1882, -	Appeal, - 137
Beaumont, Linton v., High Court, July 18, 1883, -	Appeal, - 303
Bell v. M'Phee, High Court, July 18, 1883, -	Suspension, - 312
Black v. Simpson, High Court, Feb. 7, 1883, -	Suspension, - 212
Bole and others v. Stevensons, High Court, Nov. 2, 1883, -	Suspension, - 350
Broadley, George, Stirling, Oct. 3, 1884, -	Culp. Hom., - 490
Brown, Ritchie v., High Court, Feb. 22, 1884, -	Appeal, - 374
Bryce v. Spence, High Court, July 10, 1885, -	Appeal, - 624
Cadenhead, Campbell v., High Court, July 15, 1884, -	Suspension, - 468
Cadenhead, M'Petrie v., High Court, March 19, 1885, -	Appeal, - 616
Caird, Robertsons v., High Court, Aug. 12, 1885, -	Suspension, - 664
Campbell, O'Neills v., High Court, July 18, 1883, -	Appeal, - 305
Campbell v. Auld, High Court, Oct. 27, 1882, -	Appeal, - 152
Campbell v. Cadenhead, High Court, July 15, 1884, -	Suspension, - 468
Carlin v. Government of Cape Colony, High Court, July 18, 1885, -	Susp. and Lib., - 649
Chalmers, Traill v., High Court, Feb. 7 and March 14, 1883, -	Suspension, - 233
Cochran v. Ferguson, High Court, Oct. 27, 1882, -	Suspension, - 169
Cormack, Haydon v., High Court, March 19, 1885, -	Appeal, - 608
Cornelius, William Thiele or, High Court, March 25, 1884, -	Cont. of Debtor's Act, 293
Craig v. M'Phee, High Court, March 14, 1883, -	Appeal, - 243
Crichton, M'Leish v., High Court, March 14, 1883, -	Appeal, - 225
Crockatt, Nelson v., High Court, Nov. 13, 1884, -	Appeal, - 514
Dalglish and Kerr v. Anderson, High Court, Feb. 22, 1883, -	Appeal, - 221
Dargie v. Dunbar, High Court, March 18, 1884, -	Appeal, - 409
Deakin and others v. Milne, High Court, Oct. 27, 1882, -	Appeal, - 174
Deas v. Stewart, High Court, July 10, 1885, -	Suspension, - 639
Devaney, Thomas, Glasgow, June 20, 1882, -	Assault, &c., - 31
Dixon (Limited), Dykes v., High Court, Feb. 7, 1885, -	Appeal, - 538
Drever and Tyre, High Court, Nov. 2, 1885, -	{ Culp. Hom. } 680
	{ Neglect of Duty, }
Dunbar, Dargie v., High Court, March 18, 1884, -	Appeal, - 409
Dykes v. Dixon (Limited), High Court, Feb. 7, 1885, -	Appeal, - 539
Farquharson v. Guthrie, High Court, July 15, 1884, -	Suspension, - 454
Ferguson, Cochran v., High Court, Oct. 27, 1882, -	Suspension, - 169
Ferguson, Gallie and others v., High Court, Nov. 21, 1883, -	Suspension, - 365
Ferguson, Hendry v., High Court, June 13, 1883, -	Appeal, - 278
Ferguson, Lennox v., High Court, June 9, 1882, -	Appeal, - 33
Ferguson v. M'Nab, High Court, July 19, 1884, -	Susp. and Lib., - 471
Finlayson, Hill v., High Court, June 13, 1883, -	Suspension, - 284
Fleck, Gemmel v., High Court, Oct. 27, 1882, -	Appeal, - 150
Fleming, Alex. Gilruth, High Court, Feb. 21 and Mar. 23, 1885, -	{ Theft, Breach of } 552
	{ Trust & Embez., }
Fleming, James Nicol, High Court, July 3, 1882, -	Fraud, &c., - 36
Fraser, M'Kenzie and another v., High Court, Oct. 25, 1882, -	Appeal, also Susp., 124
Gallie and others v. Ferguson, High Court, Nov. 21, 1883, -	Suspension, - 365
Galloway, Leisk and Sandison v., High Court, Nov. 12, 1884, -	Appeal, - 497
Garland, Hutton v., High Court, June 13, 1883, -	Appeal, - 274
Gemmel v. Fleck, High Court, Oct. 27, 1882, -	Appeal, - 150
Gemmell, Kay v., High Court, Nov. 13, 1884, -	Appeal, - 535
Gemmell v. Hadden, High Court, July 10, 1885, -	Appeal, - 622



	PAGE
Glasgow City and District Railway Co. v. Hutchison and others, High Court, March 20, 1884	Appeal, - 420
Glasgow City and District Railway Co. v. Meldrum's Trustees, High Court, July 15, 1884	Appeal, - 464
Glass and another v. Linton, High Court, Oct. 27, 1882	Suspension, - 160
Gollan, Alexander and others, High Court, July 23 and 24, 1883	Mobbing, Rioting, &c., 317
Government of Cape Colony, Carlin v., High Court, July 18, 1885	Susp. and Lib., - 649
Gracie v. Stuart, High Court, Feb. 22, 1884	Susp. and Lib., - 379
Grassom, Archibald, and James Drummond, Inveraray, Sept. 30, 1884	{ Culp. and Reck. } 483
Greenhill v. Stirling, High Court, March 19, 1885	{ Neglect of Duty, } 602
Guthrie, Farquharson v., High Court, July 15, 1884	Appeal, - 454
Hadden, Gemmell v., High Court, July 10, 1885	Suspension, - 622
Hannah, John, High Court, Nov. 2, 1883	Appeal, - 346
Hart, Henretty v., High Court, Dec. 17, 1885	Lewd Practices, - 703
Hart, King v., High Court, June 9, 1882	Appeal, - 16
Harvey and others, Wilson v., High Court, Nov. 13, 1884	Appeal, - 518
Haydon v. Cormack, High Court, March 19, 1885	Appeal, - 608
Henderson, Roberts v., High Court, Oct. 25, 1882	Susp. and Lib., - 118
Hendry v. Ferguson, High Court, June 13, 1883	Appeal, - 278
Henretty v. Hart, High Court, Dec. 17, 1885	Appeal, - 703
Higgins v. The Earl of Moray, Inverness, Sept. 9, 1884	Appeal, - 479
Hill v. Finlayson, High Court, June 13, 1883	Suspension, - 284
Hunter v. Mawlam, High Court, Nov. 21, 1883	Suspension, - 354
Hutchison and others, Glasgow City and District Railway Co. v., High Court, March 20, 1884	Appeal, - 420
Hutton v. Garland, High Court, June 13, 1883	Appeal, - 274
Ingram, Lowdon v., High Court, July 15, 1884	Appeal, - 458
Kay v. Gemmell, High Court, Nov. 13, 1884	Appeal, - 535
Kelly, Charles, Glasgow, Dec. 24, 1885	{ Crim. Law } 722
Kerr, Anderson v. Dalglish and, High Court, Feb. 22, 1882	{ Amend. Act, } 221
King v. Hart, High Court, June 9, 1882	Appeal, - 16
Lee, J. B. Walker, High Court, Oct. 20, 1884	{ Breach of Trust } 492
Lee v. Local Authority of Lasswade, High Court, Nov. 2, 1883	{ and Embez., } 329
Leisk and Sandison v. Galloway, High Court, Nov. 12, 1884	Appeal, - 497
Lennox v. Ferguson, High Court, June 9, 1882	Appeal, - 33
Lindsay, Wynn and another v., High Court, Nov. 22, 1883	Susp. and Lib., - 370
Linton, Glass and Dempster v., High Court, Oct. 27, 1882	Suspension, - 160
Linton, Prentice v., High Court, Feb. 7, 1883	Suspension, - 210
Linton v. Beaumont, High Court, July 18, 1883	Appeal, - 303
Little, George, and others, Dumfries, April 3, 1883	{ Culp. Hom. and } 259
Local Authority of Lasswade, Lee v., High Court, Nov. 2, 1883	{ Neglect of Duty, } 329
Local Authority of Perthshire, Robertson v., High Court, June 13, 1883	Appeal, - 267
Lowdon v. Ingram, High Court, July 15, 1884	Appeal, - 458
MacDonald, School Board of North Uist v., High Court, March 19, 1885	Appeal, - 614
M'Donald v. White, High Court, June 9, 1882	Suspension, - 19
M'Dougall, Murray v., High Court, Feb. 7, 1883	Appeal, - 215
M'Dowall, Worrall, Hallam & Co. v., Glasgow, Aug. 29, 1885	Appeal, - 670
M'Gregor, David, and another, High Court, July 21, 1884	Cont. of Debtors Act, 474
Mackay and another v. Patrick, High Court, Oct. 25, 1882	Susp. and Lib., - 132
Mackenzie and another v. Fraser, High Court, Oct. 25, 1882	Appeal, also Susp., 124
M'Lean v. Murdoch, High Court, Dec. 22, 1882	Suspension, - 193
M'Leish v. Crichton, High Court, March 14, 1883	Appeal, - 225
Macleod v. Speirs, High Court, March 18, 1884	Susp. and Lib., - 387
M'Mullan v. M'Phee, High Court, June 9, 1882	Appeal, - 1
M'Nab, Ferguson v., High Court, July 19, 1884	Susp. and Lib., - 471
Macnaughton v. Maddever, High Court, Nov. 12, 1884	Suspension, - 509
M'Petrie v. Cadenhead, High Court, March 19, 1885	Appeal, - 616
M'Phee, Bell v., High Court, July 18, 1883	Suspension, - 312

# INDEX OF NAMES.

ix

	PAGE
M'Phee, Craig v., High Court, March 14, 1883, .	Appeal, . 243
M'Phee, Milton v., High Court, Oct. 27, 1882, .	Appeal, . 165
M'Phee, M'Mullan v., High Court, June 9, 1882, .	Appeal, . 1
M'Phee, Ritchie v., High Court, Oct. 25, 1882, .	Susp. and Lib., . 147
Maddever, Macnaughton v., High Court, Nov. 12, 1884, .	Suspension, . 509
Maddever, Reaney v., High Court, Nov. 22, 1883, .	Susp. and Lib., . 367
Matheson v. Ross, High Court, March 19, 1885, .	Suspension, . 582
Mawlam, Hunter v., High Court, Nov. 21, 1883, .	Suspension, . 354
Meldrum's Trustees, Glasgow City and District Rail- way Co. v., High Court, July 15, 1884, .	Appeal, . 464
Milne, Deakin and others v., High Court, Oct. 27, 1882, .	Appeal, . 174
Milton v. M'Phee, High Court, Oct. 27, 1882, .	Appeal, . 165
Murdoch, M'Lean v., High Court, Dec. 22, 1882, .	Suspension, . 193
Murray, Stirling v., High Court, June 13, 1883, .	Suspension, . 265
Murray, Stuart v., High Court, Nov. 13, 1884, .	Appeal, . 526
Murray v. M'Dougall, High Court, Feb. 7, 1883, .	Appeal, . 215
Neilson, Robert, Glasgow, June 17, 1884, .	Fire-raising, &c., . 451
Nelson v. Crockatt, High Court, Nov. 13, 1884, .	Appeal, . 514
Nicholson v. Yoole, High Court, July 10, 1885, .	Appeal, . 628
O'Connor, Patrick, Glasgow, Dec. 27, 1882, .	Murder, . 206
O'Neills v. Campbell, High Court, July 18, 1883, .	Appeal, . 305
Patrick, Mackay and another v., High Court, Oct. 25, 1882, .	Susp. and Lib., . 132
Prentice v. Linton, High Court, Feb. 7, 1883, .	Suspension, . 210
Pyper v. Walker, High Court, July 10, 1885, .	Suspension, . 631
Reaney v. Maddever, High Court, Nov. 22, 1883, .	Susp. and Lib., . 367
Ritchie v. Brown, High Court, Feb. 22, 1884, .	Appeal, . 374
Ritchie v. M'Phee, High Court, Oct. 25, 1882, .	Susp. and Lib., . 147
Roberts v. Henderson, High Court, Oct. 25, 1882, .	Susp. and Lib., . 118
Robertsons v. Caird, High Court, Aug. 12, 1885, .	Suspension, . 664
Robertson v. Local Authority of Perthshire, High Court, June 13, 1883, .	Appeal, . 267
Rodger, Walker v., High Court, March 19, 1885, .	Suspension, . 595
Ross, Matheson v., High Court, March 19, 1885, .	Suspension, . 582
School Board of North Uist v. MacDonald, High Court, March 19, 1885, .	Appeal, . 614
Simpson, Black v., High Court, Feb. 7, 1883, .	Suspension, . 212
Simpson, William, High Court, July 16, 1883, .	Cont. of Debtor's Act, 293
Slaven, Patrick, and others, High Court, Nov. 17, 1885, .	{ Assault with In- } 694 { tent. Culp. Hom., }
Smillie, Robert, Glasgow, June 20, 1883, .	Fire-raising, . 287
Smith v. Wood, High Court, Dec. 6, 1882, .	Appeal, . 186
Soutar, Charles, High Court, Oct. 23, 24, 1882, .	Violating Sepulchre, 65
Speira, Macleod v., High Court, March 18, 1884, .	Susp. and Lib., . 387
Spence, Bryce v., High Court, July 10, 1885, .	Appeal, . 624
Stevensons, Bole and others v., High Court, Nov. 2, 1883, .	Suspension, . 350
Stewart, Deas v., High Court, July 10, 1885, .	Suspension, . 638
Stirling, Greenhill v., High Court, March 19, 1885, .	Appeal, . 602
Stirling v. Murray, High Court, June 13, 1883, .	Suspension, . 265
Stuart, Gracie v., High Court, Feb. 22, 1884, .	Susp. and Lib., . 379
Stuart v. Murray, High Court, Nov. 13, 1884, .	Appeal, . 526
The Earl of Moray, Higgins v., Inverness, Sept. 9, 1884, .	Appeal, . 479
Thiele, Wm., or Cornelius, High Court, Mar. 24, 25, 1884, .	Cont. of Debtors Act, 443
Traill, v. Chalmers, High Court, Feb. 7 and March 14, 1883, .	Suspension, . 233
Walker v. Rodger, High Court, March 19, 1885, .	Suspension, . 595
Walker, Pyper v., High Court, July 10, 1885, .	Suspension, . 631
Watson, Henry, High Court, Dec. 15, 1885, .	{ Crim. Law } 696 { Amend. Act, }
Watson, Mary Ann, High Court, May 19, 1884, .	Theft and Prev. Con., 448
White, M'Donald v., High Court, June 9, 1882, .	Suspension, . 19
Wilson, William, High Court, July 3, 1882, .	Cont. of Debtors Act, 48
Wilsone v. Harvey and others, High Court, Nov. 13, 1884, .	Appeal, . 518
Wood, Smith v., High Court, Dec. 6, 1882, .	Appeal, . 188
Worrall, Hallam & Co. v. M'Dowall, Glasgow, Aug. 29, 1885, .	Appeal, . 670
Wynn and another v. Lindsay, High Court, Nov. 22, 1883, .	Susp. and Lib., . 370
Yoole, Nicholson v., High Court, July 10, 1885, .	Appeal, . 628

## ERRATA.

- Page 1, on first line of rubric, *for* "LXXII.," *read* "COLXXII."
- „ 16, on last line, *for* "c. 35," *read* "c. 101."
- „ 150, on second line of rubric, *for* "xxv.," *read* "35;" and on seventh line of rubric, *for* "Act," *read* "Acta."
- „ 208, on second last line, *for* "Brand," *read* "R. V. Campbell."
- „ 483, on last line, *for* "charging," *read* "charged."

c'c

# REPORTS, &c.

VOLUME V.

---

## HIGH COURT.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

THOMPSON M'MULLAN, Appellant—*Graham Murray.*

AGAINST

DONALD M'PHEE, Respondent—*Mackintosh.*

BROKER—STATUTE 29 AND 30 VIC., c. LXXII., SECS. 172, 184, AND 200, GLASGOW POLICE ACT, 1866—LICENSE—RELEVANCY—PROOF.—In an Appeal by a person convicted 'of the offence libelled' upon a charge under sections 172, 184, and 200 of 'The Glasgow Police Act, 1866,' of having, within or near the premises occupied by him, carried on the trade of a broker within the meaning of said Act without having obtained a license so to do, by 'purchasing from some person or persons to the complainant unknown, second-hand articles or goods, viz., twenty-three and a half or thereby potato bags which had been in use.' Held that the complaint was relevant, but 2d (*dissentiente* Lord Craighill), that the single act of purchase proved was not sufficient to establish that the accused carried on the trade of a broker as defined by section 200 of the Statute.

THIS was an Appeal at the instance of THOMPSON M'MULLAN, residing at Monteith Row, and carrying on business as a broker in Spoutmouth, both in Glasgow, against a conviction and sentence pronounced by the Stipendiary Magistrate (Gemmell) in the Central Police Court of Glasgow, upon a complaint at the instance of DONALD M'PHEE, Procurator-Fiscal, which charged the appellant with having, on or about the fifth day of December 1881 years, within or near the store or other premises occupied or possessed by him the said Thompson M'Mullan, situated in or near Spoutmouth, Glasgow,

1882.

No. 1.  
M'Mullan  
v.  
M'Phee.

High Court,  
June 9.

Appeal.

1882.

No. 1.

M'Mullan

v.

M'Phee.

High Court,  
June 9.

Appeal.

carried on the trade of a broker, within the meaning of 'The Glasgow Police Act, 1866,' without having obtained a license so to do from the Magistrates' Committee of the city of Glasgow; and this the said Thompson M'Mullan did by then and there purchasing from some person or persons to the complainer unknown, second-hand articles or goods, viz., twenty-three and a half or thereby potato bags which had been in use, in contravention of the said Act, particularly sections 172 and 184 thereof.

The following was the conviction and sentence complained of:—

At Glasgow, the 1st day of February 1882 years, in presence of John Gemmel, Esquire, Police Magistrate of the City and Royal Burgh of Glasgow, appeared the defender the said Thompson M'Mullan; and the charge having been read over to him he pleaded not guilty, and the said Magistrate having heard the said defender in answer to said charge, and the witnesses adduced having been examined on oath in his presence, the said Magistrate, on the evidence adduced, finds the charge proven, and convicts the said defender of the offence libelled. In respect whereof finds the said defender liable in a penalty of five pounds, and in default of payment decerns and adjudges the said defender to be committed to the prison of Glasgow, and detained therein, subject to the rules thereof, for one month from this date, unless said penalty be sooner paid, and grants warrant to officers of Court to convey the said defender to said prison, and to the keeper thereof to receive and detain him accordingly.

GRAHAM MURRAY, for the appellant.—The complaint is irrelevant. It charges the appellant with having, on the date and at the place libelled, carried on the trade of a broker, within the meaning of 'The Glasgow Police Act, 1866,' without having obtained a license so to do. It then proceeds: 'And this he did by then and there purchasing from some person or persons to the complainer unknown, second-hand articles or goods, viz., twenty-three and a half or thereby potato bags which had been in use.' But it omits to add in this part of the complaint, which is the sequel of the part that precedes, that the appellant had not at the time a license. Secondly, what is set forth in the complaint does not amount to the

offence in the Statute (reads secs. 172 and 200<sup>1</sup>). What the specification of the offence in the complaint amounts to saying is that any person who buys a second-hand article—an article which has been in use—is guilty of a contravention of the 172d section of the Act. Such a construction would lead to absurd results. The offence as defined in the Statute is the ‘occupying and using any building or part of a building,’ &c., ‘as a dealer in second-hand goods or articles, or old metals, bones, or rags’ (reads sec. 200). But the complaint does not say anything about dealing, and does not say that any premises were used or occupied by the appellant as a dealer. Nothing is averred in it which amounts to carrying on the trade of a broker as it is defined by section 200. If the words of the complaint be read or inserted into the conviction—which, as

1882.

No. 1.

M’Mullan

v.

M’Phee.

High Court,  
June 9.

Appeal.

<sup>1</sup> Statute 29 and 30 Vic., c. CCLXXIII.

Section 172. Every person desirous of carrying on within the city any of the following trades, as more particularly defined in the special provisions relating thereto, shall make an application in writing to the Magistrates’ Committee for a license, and shall sign such application and deliver it to the clerk,—namely, the trades of a broker, a retailer of fireworks, a driver of a stage or hackney carriage, and a porter or public carter standing for hire in any public or private street or court, or a chimney-sweep.

Section 184. Every person who keeps, uses, or lets for hire within the city any stage or hackney carriage, or who carries on any of the trades hereinbefore mentioned without a certificate or license, or during the time that such certificate or license is suspended, or after it has been revoked, or who, in his application to the Magistrates’ Committee, untruly or incorrectly states any particular which he is by the Magistrates’ Committee required to state therein, shall be liable to a penalty not exceeding £5 for the first offence, and to a penalty not exceeding £10 for each subsequent offence.

Section 200. In construing the general provisions relating to certificates and licenses, and the provisions classed under this head (SPECIAL PROVISIONS—PAWNBROKERS AND BROKERS), the following words shall have the meanings hereinafter attached to them, unless there be something in the subject or context repugnant to such construction:—The word ‘Pawnbroker’ shall mean, &c. The word ‘Broker’ shall mean any person who occupies and uses any building, or part of a building, or other place, including a stall in a public market, as a dealer in second-hand goods or articles, or in old metals, bones, or rags.

1882. being a general conviction of the contravention charged,  
 No. 1. refers to the charge in the complaint for the specification  
 M'Mullan of the offence—it will be found that all that the appel-  
 M'Phee. lant has been convicted of is that which follows the  
 High Court, words, 'and this the said Thompson M'Mullan did ;'  
 June 9. and when so read the conviction does not amount  
 Appeal. to the offence as defined in sections 172 and 200.  
 Further, upon the merits, the interpretation put upon  
 the Statute by the Magistrate is also untenable. The  
 appellant buys both new and second-hand bags, and  
 these he principally converts into smaller bags for hold-  
 ing rivets ; and he sells these wholesale. If regard be  
 had to the other trades which are associated in the  
 enactment in section 172 with the trade of broker it is  
 clear that the section was not intended to be applied to  
 the style of wholesale dealings carried on by the  
 appellant ; and this is made more evident by a reference  
 to the regulations regarding the offences which may  
 be committed by brokers contained in section 206. The  
 section provides for the words '*licensed dealer*' being  
 painted over the door under a penalty, and prohibits  
 under a penalty articles purchased from being sold till  
 seven days have elapsed. These regulations are in-  
 applicable to the kind of business which is carried on  
 by the appellant. They might with equal propriety be  
 applied to the business of a paper maker ; and if the  
 Court by the judgment to be pronounced in this Appeal  
 were to constrain him to subject himself to them he will  
 be materially hindered in carrying on the wholesale  
 operations of his business as hitherto conducted by  
 him.

LANG, for the respondent.—The complaint contains the  
 whole of the elements of the contravention charged as it  
 is defined by the Statute. It is substantially averred  
 that the appellant was a dealer in second-hand articles,  
 and carried on the trade of a dealer in second-hand  
 articles. Section 200 defines the word 'broker' as  
 meaning (reads), and the complaint charges him with



having carried on the trade of broker without a license within premises occupied and possessed by him, within which premises he dealt, 'and this' he 'did by then and there purchasing' the articles libelled in contravention of the Statute. That incorporates the averment in the previous part of the charge, and makes it clear that the acts alleged to have been carried on are said to have been carried on by way of dealing. It is said that he dealt as a broker, and the particular instance given of his so dealing is by then and there, as is stated, purchasing the twenty-three and a half bags from the persons designed in contravention of the Statute. To that it might be pleaded as a defence that the purchase was not made by the appellant in the way of trade, but for himself; but on the contrary he here pleads that he is a wholesale dealer in old and new bags, and that the purchase was made in the way of trade, the object of the plea being to show that there is a difference between a retail and wholesale dealer, and that the Act applies to retail dealers only. The Magistrate finds it proved that he sells as well as purchases both old and new bags, and he is convicted of carrying on the trade of a broker by using the premises libelled as a dealer, and this by buying the bags libelled. The Magistrate therefore was satisfied that this was a purchase in the course of dealing, and if the words of the complaint be inserted into the conviction, which is a general conviction, the Magistrate has so found. The complaint being therefore, we submit, perfectly relevant, the conviction is also relevant. So that whether the Case be taken on the relevancy or on the merits, the conviction ought to be sustained. It is very necessary in order to assist in the detection of thefts that such dealers should be subject to the regulations contained in the Statute, which throw no obstacle in the way of carrying on legitimate trade. Why should the appellant not therefore take out a license? He cannot be heard to plead that his business will be hindered.

The Court at the first calling of the Case on February

1882.

---

No. 1.  
M'Mullan  
v.  
M'Phee.

---

High Court,  
June 9.

---

Appeal.

---

1882.  
 No. 1.  
 M'Mullan  
 v.  
 M'Phee.  
 High Court,  
 June 9.  
 Appeal.

28, 1882, intimated that they would delay pronouncing judgment in order to afford an opportunity to the parties coming to an arrangement, and it was suggested that upon the respondent undertaking not to insist in the enforcement of the penalty decerned for the appellant might take out a license, to which it was objected on his behalf that the regulations imposed by the Statute upon licensed brokers would materially interfere with the carrying on of the kind of business he had hitherto been engaged in, and that unless the Court was prepared to constrain him to submit to these regulations he must insist in his Appeal. The Case was again called on 26th May, when it was intimated that no arrangement had been come to, and no license taken out. In answer to a question from the Bench as to the nature and extent of the business which had been carried on by the appellant in his past dealings, it was stated from the Bar on his behalf that his past dealings, with the exception referred to in the complaint, had been on a large scale, and that he was willing to undertake to buy only in large quantities from the trade in future. It was replied for the respondent that as they thought that the conviction was right, and ought to be sustained, they had not thought it necessary to make any enquiry as to the truth of the appellant's statements regarding his past dealings.

The Court thereupon ordered the papers to be printed, and the Case again appeared upon the rolls on 9th June 1882.

In the Case the Magistrate stated—

Before pleading to the complaint the defender's agent objected to the relevancy of the charge, that the complaint libelled only the purchase of second-hand articles or goods, which did not constitute an offence under the Statute; and also that the business carried on by the appellant for twenty-three years or so was not of the description calling for a broker's license; that he carried on a large and extensive wholesale business in the purchase and sale of bags new and old; that he also manufactured old bags of a large size into small rivet bags, and sold them in wholesale quantities.

I held that, on the face of the complaint, a relevant charge of contravention of the sections of the Acts libelled was set forth, and repelled the objections as far as relevancy was concerned, leaving the effect of them to be considered on the merits after the evidence had been led.

At the trial it was proved that on the date libelled, 5th December 1881, two bundles of used potato bags, each containing seventeen to nineteen bags, and each individual bag marked with the words, 'Alexander Barr, 48 Grafton Street, Glasgow—not to be sold or exchanged,' were stolen from a table in the North British Railway Station at Queen Street, Glasgow, having been left there about one o'clock P.M. on said date by the owner, the said Alexander Barr, who had in use and circulation at the time 800 bags similarly marked.

It was further proved that about five o'clock P.M., on the same date, a man, who gave his name and address as O'Donnell, 40 New Wynd, came in to the open store kept by the appellant in Spoutmouth, and put upon a scale there a bundle containing twenty-three used potato bags of precisely the same description, and with the same printed markings thereon, as those which had been stolen, and that the same were then and there purchased by the appellant at the price of 3s. 9d. for the lot.

After the purchase the bags were, in the ordinary course of the appellant's business, in regard to bags in the condition of the lot in question, handed over to one of the appellant's workwomen employed in the store, with instructions to cut and make up the same into rivet bags, for the purpose of being sold to rivet-makers.

The twenty-three bags, with one exception, were accordingly cut up, each into three pieces, and on the 7th December were recovered in that state by the police.

Search was subsequently made for the man O'Donnell, but no person of that name could be found at the address given by him.

It was proved that at the date of said purchase the appellant did not hold the broker's license provided for in section 172 of the Police Act aforesaid.

It was further proved on behalf of the appellant that at the time of the purchase by him he took a receipt or discharged invoice from the man O'Donnell for the price of the bags, and that this receipt was delivered up by the appellant to the officer who recovered the bags, and that it had been mislaid or lost after coming into the hands of the police.

It was also proved for the appellant that generally he does not retail bags, but re-sells them either in their original or altered form in wholesale quantities to merchants and others.

On the facts so proved I found the appellant guilty of the contravention charged in the complaint; and, in the whole circumstances, imposed the full penalty provided by the Police Act. The penalty was paid in Court.

1882.

---

No. 1.  
M'Mullan  
M'Phee.

---

High Court,  
June 9.

---

Appeal.

1882.

No. 1.  
M'Mullan  
v.  
M'Phee.

High Court,  
June 9.

Appeal.

The questions for the opinion of the Court were:—

Whether the complaint was relevant? Whether the appellant, in making the said purchase, carried on the trade of a broker as defined by section 200 of 'The Glasgow Police Act, 1866'?

LORD CRAIGHILL.—There is presented in this Case the appeal of the complainer, Thompson M'Mullan, against a sentence of the Police Magistrate of Glasgow, by which he was convicted and sentenced to punishment for a contravention of the Glasgow Police Act of 1866, secs. 172 and 184, in so far as he had, on or about 5th December 1881, within or near a store or other premises occupied or possessed by him, situated in or near Spoutmouth, Glasgow, carried on the trade of broker, within the meaning of the said Statute, without having obtained a license so to do, from the Magistrates' Committee of the city of Glasgow, by his then and there purchasing from some person or persons, to the prosecutor unknown, second-hand articles or goods, to wit, twenty-three and a half or thereby used or second-hand potato bags.

Before pleading the appellant objected to the relevancy of the charge, the ground of objection being that the complaint libelled only the purchase of second-hand articles or goods, which did not constitute an offence under the Statute; but this objection was repelled. The Case, accordingly, went to trial, and after evidence had been led, it having been thereby proved that twenty-three and a half used potato bags had been purchased by the appellant at the price of 3s. 9d. for the lot, and it having been also proved that the appellant generally does not retail bags, but re-sells them, either in their original, or in an altered form, in wholesale quantities, to merchants and others, the Magistrate convicted the appellant of the offence charged, and imposed the full penalty provided by the Statute libelled. Upon this appeal was entered, and the Case, consequently, is that which is now before the Court for judgment.

Two questions are submitted for the opinion of the Court, first, whether the complaint was relevant, and,

secondly, whether the appellant, in making the said purchases, carried on the trade of a broker, as defined by sec. 200 of the Glasgow Police Act of 1866. With reference to the first of these questions, I am of opinion that it ought to be answered in the affirmative. The complaint bears that the appellant carried on the trade of a broker, within the meaning of the Glasgow Police Act of 1866, without having obtained a license so to do from the Magistrates' Committee of the city of Glasgow, and this he did by then and there purchasing used or second-hand bags which were offered for sale. Could this charge be reasonably read so as to import that the only thing charged was the single purchase of a lot of bags it might be conceded that a contravention had not been committed; but the allegation of purchase must be taken in connection with the allegation that a trade was carried on, the purchase being simply an act performed in a course of dealing. Plain it is that the complaint, reasonably construed, imports that there was a trade carried on, that the purchase in question was an instance of dealing in the course of that trade, and that this reading of the charge is all which is required to bring the Case within the bounds of the Statute.

As regards the second question, I am of opinion that the answer upon it also should be in the affirmative. The meaning of that question is to be gathered from the defence which was maintained. The appellant alleged that he carried on a large wholesale business in the purchase of bags, new and old, that he also manufactured old bags of a large size into small rivet bags, which he sold in wholesale quantities, and that, as a consequence, a license was not required.

This was the defence. But what was found proven was that the appellant bought in retail, that though he did not retail bags generally, yet sometimes he also resold used or second-hand bags by retail. This truly appears to me to be even more than is required to warrant a conviction. The appellant bought the bags in question in retail in the usual course of his business,

1882.

No. 1.

M'Mullan

v.

M'Phee.

High Court,  
June 9.

Appeal.

1882.

No. 1.

M'Mullan

v.

M'Phee.

High Court,  
June 9.

Appeal.

and even if the purchases were sold by wholesale my opinion would be that he is a broker or dealer in second-hand articles, within the meaning of the Glasgow Police Act of 1866. Purchasing by retail is the thing which requires supervision. Whether the articles purchased are sold in retail or wholesale is practically immaterial. In a recent case which was tried in Glasgow the articles purchased by a broker were re-sold by the ton, but they had been purchased in quantities which women brought in their aprons. I cannot doubt that such a trafficking was carrying on the business of a broker, and the purpose for which the enactments in question were passed would be defeated if such a defence as that which is now under consideration were to be sustained.

I think, therefore, that both questions ought to be answered in the affirmative, the effect of which would be to affirm the decision of the Magistrate.

LORD ADAM.—In this Case the complaint against the appellant was brought under the Glasgow Police Act of 1866, and it charged him with having, on or about the 5th day of December 1881, within or near the store or premises occupied or possessed by him, situated in or near Spoutmouth, Glasgow, carried on the trade of a broker within the meaning of that Act, without having obtained a license so to do from the Magistrates' Committee of the city of Glasgow.

Now, I quite agree with what Lord Craighill has said in the course of his opinion, that complaints in an inferior Court—as I said in the Portobello case<sup>1</sup>—are not to be too literally construed, and I do not say that I would have found the present complaint irrelevant. It contains an averment that he carried on the trade of a broker by making a single purchase; but as it is possible to regard this as an illustration of the mode in which he carried on a course of dealing, I am not prepared to say what my judgment on the relevancy might have been.

---

<sup>1</sup> *M'Donald v. White*, High Court, 9th June 1882. See *infra*, p. 26.

Section 200 of the Statute, which is printed in the Case, defines what a broker is, in reference to this complaint. It says this—‘The word “broker” shall mean any person who occupies and uses any building, or part of a building or other place, including a stall in a public market, as a dealer in second-hand goods or articles, or in old metals, bones, or rags.’ Now, there is no question that this person, the appellant, did occupy a building which was used as a store of some kind or other. Nor is there any doubt that he does deal in second-hand goods of some kind or other. Before pleading to the complaint the defender’s agent objected to the relevancy of the charge, that it libelled only the purchase of second-hand articles or goods, which did not constitute an offence under the Statute. That was the first objection made, and the Stipendiary Magistrate refused to sustain that objection. In doing that I think he did perfectly right, because it appears to me that a person is dealing in second-hand goods whether he purchases or whether he sells. That seems to be quite clear. If a person buys second-hand articles or anything else, he is dealing in them ; and I do not think it was at all necessary to lead evidence in the inferior Court to show that the appellant sold them again. And there is still less in the distinction which was made between the man who sells the things in the same form as he bought them, and the man who buys articles such as potato bags, and cuts them up and sells them as small bags instead of large ones. Nor is there anything in the objection that one may sell in large and another in small lots. I could not listen to that for a moment.

The next objection does not appear to me to be an objection to relevancy. It was objected ‘that the business carried on by the appellant for twenty-three years or so was not of the description calling for a broker’s license, that he carried on a large and extensive business in the purchase and sale of bags, new and old ; that he also manufactured old bags of a large size into

1882.

No. 1.

M’Mullan

v.

M’Phee.

High Court,  
June 9.

Appeal.



1882.

No. 1.  
M'Mullan  
v.  
M'Phee.

High Court,  
June 9.

Appeal.

small rivet bags, and sold them in wholesale quantities.' But there is no distinction drawn of such a nature as to enable us to judge what is a wholesale and what a retail quantity. I do not know how that may be, but I am clear upon this, that the goods bought in this particular case consisted of twenty-three and a half potato bags, and that they were bought for the sum of 3s. 9d. I confess I should have the greatest difficulty in the world in coming to the conclusion that a purchase to the extent of 3s. 9d. was a wholesale transaction. Thus far my opinion agrees with that of Lord Craighill.

But, then, the main question here is, Whether the appellant, in making the said purchase, carried on the trade of a broker, as defined by section 200 of 'The Glasgow Police Act, 1866?' So far as I can see within the four corners of the Case, there is no evidence whatever to shew that this was anything else than a single act of purchase. We have no evidence of traffic on the part of the appellant, and if the Case depends on the question whether in purchasing twenty-three and a half potato bags the appellant was carrying on the trade of a broker, I am decidedly of opinion that the evidence is not sufficient to warrant the conviction. So far as appears, and, indeed, it is so put, it was an individual purchase on his part. If the facts proved had been that this man had been carrying on a course of dealing as a broker in buying second-hand goods, there might have been something to say. Possibly the Magistrate relied partly on the inference to be drawn from one single act—inferred from that that there was a course of dealing. I am not satisfied with that. I am not prepared, therefore, to answer the question in the affirmative, that proof of one single act of purchase is sufficient evidence to prove a course of dealing. I do not think, therefore, that the conviction can stand.

LORD YOUNG.—The question here is no doubt of some interest, and I must regard as of some difficulty also, seeing that your Lordships differ in the conclusions at



which you have arrived. And the Case is not really un-attended with difficulty. It has been before us several times. We delayed it originally in order that we might have more information with respect to the past, and also with respect to the future, trade of the appellant. The Case does not give us much information. We might have sent it back to be amended, but it was not suggested that the evidence led before the Magistrate was such as to enable him to give us more information upon the point.

It seems that by the Glasgow Police Act everybody carrying on the trade of a broker must obtain a license, the object being plainly for security against thieves, and that those who are licensed brokers require to keep a register open to the inspection of the police, so that their purchases may be seen. The appellant here says that he is a wholesale dealer, and that his business does not fall within the definition of a broker by the 200th section of the Statute, which says that the word 'broker' shall mean any person who occupies and uses any building or part of a building or other place, including a stall in a public market, as a dealer in second-hand goods or articles, including old metals, bones, or rags. Now, that language is miscellaneous enough, but it conveys a pretty vivid idea of the kind of provisions that are required for the security of property against thieves. The class who are aimed at seem to be those who wittingly or unwittingly may buy goods which have been stolen, and they are hereby required to keep a register of their purchases. The appellant says he is not of that class, and he objects to the relevancy of the complaint, because, amongst other things, it does not sufficiently set forth that he is of that class.

But upon that matter I agree with both your Lordships that the complaint does set forth that he is of the class, because it sets forth that he carried on the trade of a broker without having obtained a license; and I am not disposed to read the words which follow—as they must be read to make the objection even plausible—

1882.

---

No. 1.  
M'Mullan  
v.  
M'Pherson.

---

High Court,  
June 9.

---

Appeal.

---

1882.

No. 1.  
M'Mullan  
v.  
M'Phee.

High Court,  
June 9.

Appeal.

'this he did by then and there purchasing a certain number of potato bags,' as being an averment that the only thing that was being done in these premises to constitute the charge of carrying on the trade of broker without a licence was the single purchase of a certain number of bags. I am disposed to read that as a specific instance of carrying on that trade, which was to be proved to be the usual course of dealing in which the complainer was engaged. I think the complaint must be held to imply what the complainer says it does not imply, viz., that this particular transaction was only an individual transaction in the course of the trade which it was to be proved he carried on, and which the complaint states he did carry on. But he says he is a wholesale dealer, that his purchases are of a wholesale character, and that his sales are also of a wholesale character,—although, no doubt, upon this occasion he did purchase the small quantity of twenty-three bags. A transaction of that extent is, I agree, a retail transaction, such as any trafficker within the definition of the statute might make, and I am altogether averse to the contention that a man who makes purchases of that nature (the criticism would apply even to smaller purchases than that) is not a dealer in second-hand articles as a broker, merely because he only sells in wholesale quantities. A man who sells is a dealer, for, to be sure, he must acquire the property somehow. Dealing is generally implied in such purchases, and people who sell retail habitually buy wholesale. Their profit consists in buying at wholesale prices, and selling at retail prices, and the converse of that is equally true. He may not only sell by retail, but he may purchase the materials—rags, old metal, &c., for instance—retail to be manufactured into goods which he may dispose of wholesale, and in cargoes. Therefore I quite agree there is nothing in that objection.

But then it is not proved that this was other than an isolated transaction—that the purchase was other than an isolated transaction with a person accidentally coming

to the appellant's shop. It is not stated that there was any other case. Indeed, it is clear enough by the implication of the second question, which your Lordship (Adam) proposes to answer in the negative, that there was none other. For the question put to us is, whether the appellant, by making the said purchase,—that is, the one individual purchase—carried on the trade of a broker as defined by the Glasgow Police Act. Now, that might be one of many individual and habitual purchases made in the course of his trade, thus shewing clearly that he was carrying on a trade, and that this was one of his many trade transactions, habitual trade transactions, more or less, according to the extent of his business. But when asked whether this one purchase constituted a carrying on of the trade, I must answer that in the negative. I thought so before, but we were of opinion that it was not quite satisfactory to proceed on this view without further information, particularly as to the future, for we were not going to open up the matter so as to have renewed evidence as to the past. Therefore we delayed the Case that it might be stated to us whether this generally wholesale dealer was prepared to give any satisfactory undertaking according to which, at least, this would appear to be a perfectly isolated transaction, as it really is on the Case before us. And he stated that his purchases were generally of bags in great numbers, up to thousands, and from merchants and regular dealers, and not from people bringing cart-loads or smaller quantities; and he said further that he had made a number of communications to the authorities, which shewed that he would hereafter make no purchases except from merchants carrying on a regular trade. It was put to the counsel for the respondents here whether that was not so—whether there was any reason to suppose that there had been any other dealing since the purchase in question of the like order, or any purchases except of a wholesale character, between merchants regularly dealing in the article—and the answer—a

1882.

No. 1.

M'Mullan

v.

M'Phee.

High Court,  
June 9.

Appeal.

1882. somewhat cool one, I must say—was that they had not  
 No. 1. troubled to inquire since they thought this conviction  
 M'Mullan was right. I read the Case by the light of all that, and  
 v. M'Phee. with the aid of all that. Therefore I answer the ques-  
 High Court, tion exactly as it is put, believing that it is put accord-  
 June 9. ing to the facts as they were proved,—Whether this  
 Appeal. individual purchase was the carrying on of the trade of  
 a broker as defined in this Act? And I am of opinion  
 that the evidence of that single purchase was not  
 evidence on which the Magistrate could reasonably con-  
 vict the appellant of carrying on that trade. The  
 evidence might have been made sufficient by bringing  
 witnesses to shew that the appellant had many such  
 transactions, and that this was really not an isolated case  
 at all. But such is not the case before us; and there-  
 fore, in accordance with the view and the spirit in which  
 we continued the Case for the information referred to,  
 and which we have substantially got, I agree with  
 Lord Adam that this second question should be answered  
 in the negative, and the conviction set aside.

The following was the Interlocutor:—

'*Edinburgh, 9th June 1882.*—Answer the first ques-  
 tion in the Case in the affirmative, and the second ques-  
 tion in the negative: Reverse the determination of the  
 inferior judge: Find the appellant entitled to expenses,  
 which modify to five guineas, for which, and one guinea  
 as the dues of extract, decern against the respondent.'

Agents for the Appellant.—J. & A. HASTIE, S.S.C.

Agents for the Respondent.—Messrs CAMPBELL & SMITH, S.S.C

---

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

JAMES KING, Appellant—*James Reid.*

AGAINST

GEORGE HART, Respondent—*Jameson.*

BYE-LAWS—OMNIBUSES, STANDING AND STARTING OF—STATUTE 25 AND  
 26 VIC., c. 35 (General Police and Improvement (Scotland) Act,

1862), SEC. 309—MAGISTRATES, POWERS OF.—The Magistrates of a Burgh having, in virtue of the powers conferred by section 309 of ‘The General Police and Improvement (Scotland) Act, 1862,’ framed and enacted bye-laws for the regulation of omnibuses, of which Bye-law V. enacted that ‘all omnibuses shall stand in and depart from, a particular square. A proprietor of omnibuses in the Burgh who started his omnibuses from his own yard without causing them first to stand in said square, upon being convicted and sentenced for having contravened the said bye-law, appealed. Held that although the Magistrates might fix by a bye-law a stance at which omnibuses shall stand and from which they shall start, it was *ultra vires* to compel all omnibuses to stand at the stance so fixed before starting where proprietors desired that they should start from another place; and the conviction and sentence quashed accordingly.

1882.

—  
No. 2  
King  
v.  
Hart.

High Court,  
June 9.

Appeal.

THIS was an appeal against a conviction of the appellant JAMES KING, a carriage and omnibus proprietor in Paisley, at the instance of the respondent GEORGE HART, the Procurator-Fiscal, in the Burgh Court there, upon a charge of having contravened Bye-law No. V. of the Bye-laws for the Regulation of Omnibuses, enacted by the Magistrates in virtue of the powers conferred by ‘The General Police and Improvement (Scotland) Act, 1862,’ 25 and 26 Vic., c. 35, sec. 309.

The bye-law (V.) was in the following terms:—‘All omnibuses shall stand in and depart from County Square, except during Saint James Day Fair holidays, when special arrangements shall be made by the Superintendent of Police.’

It was charged in the complaint that the appellant on a Sunday libelled ‘did cause three or thereby omnibuses then plying or running between Paisley and Glasgow for the conveyance of passengers, and of which he is the proprietor, to stand in and depart from New Smithhills Street, Paisley, not being the place—viz., County Square, Paisley—fixed and appointed by said bye-law for such omnibuses to stand in and depart from, whereby the said James King is liable,’ &c.

It was stated in the Case that the appellant of the date libelled caused three omnibuses belonging to him to

1882.  
 No. 2.  
 King  
 v.  
 Hart.  
 High Court,  
 June 9.  
 Appeal.

leave his yard, situated in New Smithfields Street (the only entrance to which yard being from that street by a gateway situated on the line of the street), on journeys to Glasgow three times during the day; and that the omnibuses, instead of proceeding west to County Square, were driven eastwards to Glasgow, County Square being situated on the west side of the river Cart, and to the west of the appellant's coachyard, which is 323 yards distant from the square. Passengers were taken up both at the yard and as the omnibuses proceeded along the streets.

The question of law for the High Court of Justiciary was :—

‘Do the facts above stated warrant the conviction of the appellant of the contravention charged?’

JAMESON, on being called on for the respondent, contended—The bye-laws were framed for the protection of the public in order to regulate the starting of omnibuses going to the same place and following one another, and if, instead of going to County Square to be put under regulations, they are to be allowed in future to start from their own premises, then the bye-laws will be rendered nugatory, and inconvenience and danger will arise to the public from the racing of omnibuses along the streets and roads in the neighbourhood, and that would be the result of sustaining this appeal. There is here a relevantly framed complaint and conviction thereon following upon a competently framed and enacted bye-law, which ought to be sustained and the question answered in the affirmative.

LORD YOUNG.—I am very clearly of opinion that this conviction is bad. The Magistrates have no right whatever to compel omnibuses to go to County Square, though they may be entitled to prescribe that as an omnibus-stand, and the only one in Paisley if they see fit, just as they are entitled by an express bye-law to prevent any cab or omnibus proprietor from setting up a cab or omnibus stand elsewhere than that prescribed by them

in the exercise of their discretion; but they are not entitled to compel a cab or omnibus proprietor to use a stand at all. If the proprietor desires to use a stand at all, of course he must go to the stand prescribed by the Magistrate; but he may use his omnibuses and cabs without any stand if he pleases. Therefore taking the facts as stated by the Magistrate, that these omnibuses were started from the stable yard, and with every propriety except only the alleged impropriety of not going to County Square, I am of opinion that this conviction is very clearly bad, and ought to be set aside.

LORD CRAIGHILL and LORD ADAM concurred.

The following was the Interlocutor:—

*‘Edinburgh, 9th June 1882.—Having considered this Case, and heard counsel for the parties, Sustain the appeal: Reverse the determination of the inferior Judge: Find the appellant entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent.’*

Agents for the Appellant.—Messrs J. & J. GARDINER, S.S.C.

Agent for the Respondent.—

---

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

JAMES M'DONALD, Suspender—*Rhind and Sym.*

AGAINST

JOHN WHITE, Respondent—*Pearson.*

OBSTRUCTING STREET—STATUTE 25 AND 26 VIC., c. 101, SEC. 251 (General Police and Improvement (Scotland) Act, 1862).—Held (*dissentiente* Lord Craighill) that a summary complaint laid upon the 251st section of 'The General Police and Improvement (Scotland) Act, 1862,' which set forth that the owner of a tenement on a date and upon a street within a burgh libelled, 'by means of a bench or stall loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, wilfully caused an obstruction on the footway' in front of the shop in said tene-

1882.

No. 2.  
King  
v.  
Hart.

High Court,  
June 9.

Appeal.



1882.

No. 3.  
M'Donald  
v.  
White.

High Court,  
June 9.

Suspension.

ment occupied by him, &c.—contained a relevant charge of a contravention of said section, and that the addition of the words, 'to the obstruction of residents or foot passengers,' was unnecessary. The proprietor of a house having been convicted upon a charge before a Police Court under the 251st section of 'The General Police and Improvement (Scotland) Act,' with obstructing the footway of a public street by means of a stall loaded with flowers, objected to the jurisdiction of that Court on the ground that, as the part of the street on which the obstruction was said to have existed was, he alleged, his private property, a question of heritable right was involved; and having presented a Bill of Suspension he declined to raise the question of heritable right in a proper civil process, whereupon the Court refused the Bill.

THIS was a Suspension at the instance of JAMES M'DONALD, green-grocer, High Street, Portobello, of a conviction and sentence pronounced in the Portobello Police Court, convicting him of the contravention charged in a summary complaint at the instance of the respondent, JOHN WHITE, the Procurator-Fiscal, and adjudging him to pay a penalty of twenty shillings, with five days' imprisonment in default of immediate payment.

The complaint was in the following terms:—

Unto the honourable the Magistrates of the Burgh of Portobello, the complaint of John White, Procurator-Fiscal of the Burgh of Portobello, humbly sheweth that James M'Donald, green-grocer, residing in High Street, Portobello, has contravened the Act of Parliament, 25th and 26th Victoria, cap. 101, sec. 251,<sup>1</sup> in so far as on the 4th day of March 1882 years, or about that time, and upon High Street, within the burgh of Portobello, he the said accused did, by means of a bench or stall, loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, wilfully cause an obstruction on the footway in front of the shop occupied by him at No. 190 High Street aforesaid.—May it therefore please your honours to grant warrant to cite the said James M'Donald to appear before you to answer to this complaint, and thereafter to convict him of the aforesaid contravention, and to adjudge him to suffer the penalty provided by the said Act. Four words delete.

*According to Justice.*

---

<sup>1</sup> Statute 25 and 26 Vic., c. 101, General Police and Improvement (Scotland) Act, 1862. Section 251: 'Every person who in any "street" or "private street," to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences,



It was stated in the Bill that the complainer is a provision merchant carrying on business in premises fronting High Street, Portobello, and which form part of a tenement which belongs to him. This tenement was formerly separated from said street by a stone wall, and it is built backward 33 feet from the centre of the street, and about  $6\frac{1}{2}$  feet from the line of the said old boundary wall, which line is marked out on the pavement in front of the tenement, the breadth of the pavement between the old boundary wall and the street being  $6\frac{1}{2}$  feet. On the eastward of the complainer's tenement is another tenement which is nearly built close up to the old boundary wall, and projects about 6 feet further forward towards the street than the complainer's tenement, and there is erected in front of this house a railing where the old wall stood. The complainer's tenement thus recedes  $6\frac{1}{2}$  feet, and this  $6\frac{1}{2}$  feet of ground has now been included in the pavement opposite to 'his shop. There is an entrance to the complainer's cellars within the line of the old boundary wall, and for the protection of the public the complainer placed four posts and chains around said entrance, on which he laid boards, and upon these shrubs and flowers. The authorities objected to these as being an obstruction, and the complainer has declined to remove them on the ground that being within the line of his own property he was entitled to place and keep them there. The above complaint was

1882.

No. 3.  
M'Donald  
v.  
Whita.

High Court,  
June 9.

Suspension.

---

shall, on conviction, be liable in a penalty not exceeding 40s., or to imprisonment not exceeding fourteen days.' These offences are specified in sub-sections, and it is, *inter alia*, enacted by

Sub-section 13—'Every person who places or leaves any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or places or uses any standing place, stool, bench, stall, or showboard on any footway.'

Sub-section 15, *inter alia*, enacts—'Every person who places, hangs up, or exposes to sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same project into or over any footway, or beyond the line of any house, shop, or building at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway.'

1882. brought accordingly. And when the complainer  
 No. 3. appeared before the Magistrates to answer thereto, he  
 M'Donald produced his titles and objected *inter alia* to the juris-  
 v. diction that a question of heritable right being involved,  
 White. a Police Court was not the proper tribunal to determine  
 High Court, such a right.  
 June 9.  
 Suspension.

Upon this and other objections which were stated being repelled, after evidence led, the complainer was convicted and sentenced as above. He thereupon presented the present Bill.

In the Bill it was *inter alia* pleaded—

The complainer is entitled to suspension as prayed for, in respect no obstruction to residents or passengers was averred in the complaint. The complaint did not aver, and it was not proved or attempted to be proved at the trial, that the complainer placed the bench or stall and fruit and vegetables mentioned in the complaint on the footway. The complainer's title to the property and plan thereof having been produced at the trial, and these *ex facie* shewing that the bench or stall with what was thereon were upon the private property of the complainer, a *prima facie* question of title to heritable property was established. It was incompetent therefore to proceed with the case in a summary manner in a Police Court.

RHIND and SYM, for the suspender, argued—The complaint is irrelevant, and the conviction is therefore bad. The words 'to the obstruction, annoyance, or danger of the residents or passengers,' at the beginning of section 251, are of the essence of the offence. There can be no relevant charge of the statutory offence which does not allege that the act charged was done to the obstruction or annoyance or danger of some one. To say merely, as the complaint does, that there was 'wilful obstruction' is not enough. The description of the offence can never be less particular than that given in the Statute, and may require to be much more so. Paley on Summary Convictions, 6th edition, p. 228.

(2) The Magistrate should have at least sisted process till the question of heritable right was determined. *Barlas v. Chalmers*, Perth, 4th April 1876, Couper, vol. iii., p. 279. The case of *Bailey v. Linton*, High

Court, November 27, 1871, Couper, vol. ii., p. 158, quoted on the other side, is distinguishable, because there the claim made was a right to obstruct at pleasure the whole width of a lane which the public had been allowed to use as a public place.

1882.

No. 3.  
M'Donald  
v.  
White.

High Court,  
June 9.

Suspension.

(3) The nature of the penalty is not set forth in the complaint as required by the Summary Procedure Act, 1864, as amended by and incorporated with the Summary Jurisdiction Act, 1881 (see schedule annexed to former Act). Besides 'penalty' means fine both in the Summary Jurisdiction Act and the General Police Act. But here the Magistrate might either fine or imprison. The complaint therefore required to state, if it stated either alternative, what the other alternative was, and this has not been done. *Thomson v. Wardlaw*, High Court, 23d January 1865, Irv., vol. v., p. 45 ; *Holland v. Ganchelland Coal Company*, High Court, 24th December 1867, Irv., vol. v., p. 561 ; *Galt v. Ritchie*, High Court, 16th July 1873, Couper, vol. ii., p. 470.

LORD YOUNG.—Do you desire to have the case sisted that you may have an opportunity of having the question of heritable right settled elsewhere ?

RHIND, for the suspender.—We do not consider the matter of sufficient importance to constrain us to raise a civil action.

PEARSON, for the respondent.—The complaint charges the causing, by means of goods specified, an obstruction on the footway, and sets forth sufficiently distinctly all the elements of the offence. It is set forth—1st, that there was a stall loaded with flowers, fruit, and vegetables, and other goods ; 2d, that the respondent by means of these wilfully caused the obstruction by placing these on the footway ; and 3d, the statement that this was done in front of the shop occupied by the suspender and on the footway disposes of the element that the stall was within the line of the respondent's property. Nothing could be competently proved under the complaint which would not amount to an offence under the

1882.  
 —  
 No. 3.  
 M'Donald  
 v.  
 White.  
 —  
 High Court,  
 June 9.  
 —  
 Suspension.

section libelled. It is not necessary to libel that what was done was done to the obstruction, annoyance, or danger of the inhabitants or passengers, and it is not necessary to prove that anyone was obstructed or annoyed. The offence consists in putting a thing upon the street which is capable of causing an obstruction whether anyone was obstructed or not. The word danger in the section shows this. The Bill ought therefore, we contend, to be refused.

LORD CRAIGHILL.—Several grounds of suspension were maintained at the bar on the part of the suspender, but the only one of these on which it is necessary for me to say anything is that in which it is maintained that the complaint is irrelevant, inasmuch as it is not there averred that the bench or stall loaded with flowers, fruits, and vegetables, or other goods, wares, or merchandise, said to have been placed by the complainer upon the High Street, was to the obstruction, annoyance, or danger of the residents or passengers.

My opinion is that this objection is well founded, and ought to be sustained. The words 'to the obstruction, annoyance, and danger of the residents or passengers,' which occur at the beginning of the 251st section, being the section libelled on in the complaint, override every one of the clauses or subsections by which particular offences have been created. The words are too clear to be consistent with any other interpretation, for they are that every person who, in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, on the evidence of one or more credible witnesses, be liable to the punishment authorised by this section of the Act. Proof of 'obstruction, annoyance, or danger of the residents or passengers' is indispensable, otherwise there would be no authority for the punishment of the accused as one by whom this provision of the Statute had been contravened; and if proof is indispensable at the trial, the averment in the framing of the libel

is equally necessary. It is said, no doubt, that the words used in the complaint are equivalent, and therefore that the objection, which, at the best, is said to be of a technical character, ought to be overruled. My opinion as to this is, first, that what is alleged is not an equivalent, and, in the next place, that even if it were, there is no good reason for a dispensation from the obligation to libel the statutory offence in the very words, or substantially in the words of the Statute. The case as it was laid was one in which any Magistrate might, unless he looked to or was familiar with the language of the Statute, reasonably conclude that the placing of anything upon the street, whether it was or was not an obstruction or annoyance or danger to residents or passengers, was an offence within the meaning of the Act. And there being no reason why the prosecutor in such a case should be excused for framing his complaint otherwise than in the language of the Statute, and there being a risk of miscarriage, not to say an illegal conviction, should such a departure from the words constituting the offence be sanctioned, it appears to me that the proper administration of justice in a case like the present requires that the objection at present under consideration should be sustained and the sentence quashed.

The importance of this question is greater in this case than perhaps it could be in many others, because taking the place where the bench was put down to be as the Magistrate has found it to be—a part of the High Street of Portobello—it is not in the line of thoroughfare, but is in a recess, the house of the complainer being six feet further back than the houses on the east and the houses on the west. It may well be, therefore, that the bench is not to the obstruction, annoyance, or danger of passengers or residents. There, residents could not be inconvenienced or subjected to annoyance or danger, and a passenger passing along could not be obstructed, for he must leave off from his course before he could come in contact with the alleged obstruction. Hence the im-

1882.

No. 3.

M'Donald  
v.  
White.High Court,  
June 9.

Suspension.

1882.

No. 3.  
M'Donald  
v.  
White.

High Court,  
June 9.

Suspension.

portance of the statutory condition being expressly made part of the charge upon which the suspender was to be put upon his trial.

LORD ADAM.—In this case the suspender is the proprietor of a shop in High Street, Portobello, and he was prosecuted for a contravention of the 251st section of the 'General Police and Improvement (Scotland) Act, 1862' (25 and 26 Vict. cap. 101). What he himself says he did is thus set forth in the third article of the condescendence. He says, 'In front of the complainer's shop is an entrance to a cellar beneath his premises, which is used constantly in connection with his business. This entrance is within the property contained in the complainer's title, and within the old boundary wall. In order to protect people from falling into this entrance when open, the complainer placed four iron posts and chains around the same, and placed boards over the chains, on which were placed shrubs and flowers, so as to make the protection more ornamental.' According to his own showing, therefore, he has placed these posts and boards, &c., upon what he alleges to be his own property, but which in fact forms part of the footway of the public street, and it is in these circumstances that this complaint was brought against him. He was charged with a contravention of the General Police and Improvement Act, 'in so far as on the 4th day of March 1882 years, or about that time, and upon High Street, within the burgh of Portobello, he, the said accused, did, by means of a bench or stall loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, wilfully cause an obstruction on the footway in front of the shop occupied by him at No. 190 High Street aforesaid.' The suspender was convicted, and has in this suspension stated a variety of objections to the conviction, but there are only two of these objections which I think now require to be considered. The first is founded upon the construction of the section libelled, which bears that 'every person who in any "street" or "private street," to

the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, be liable' in certain penalties. Then follows a number of subsections, in which a variety of offences are specified, and in what has been called in the argument the 13th subsection the offence with which we are here dealing is thus described—'Every person who places or leaves any furniture, goods, wares, or merchandise, or cask, tub, basket, pail, or bucket, or places or uses any standing place, stool, bench, stall, or showboard on any footway.' And the objection is that there are no averments in the complaint to the effect that what the suspender did was done to the obstruction, annoyance, or danger of the residents or passengers, or that anyone was obstructed; and that that forms an essential element of the charge which must be set forth. Now, it appears, as I have said, that the complainer, on that spot and on the boards placed as described, did put shrubs and flowers, and that there is no doubt that the spot forms part of the foot-pavement of the public street, and the only question is whether the words in the complaint, 'and did by means of a bench or stall, &c., wilfully cause an obstruction on the footway in front of the shop occupied by him at 190 High Street,' are a sufficient averment of the offence under the Statute. I quite agree with Lord Craighill in thinking that the words 'to the obstruction, annoyance, or danger of the residents or passengers,' override all that follows in the section, and that each of the enumerated offences must be done to the obstruction or annoyance or danger of the residents or passengers. But the question is, whether or not this is not sufficiently set forth in the complaint? Now, it humbly appears to me to be common sense that if a person put on the footway a bench loaded with flowers, it necessarily follows from the nature of the thing that he thereby causes an obstruction to the residents of the district and the passengers. To construe the complaint in a Police Court so literally and strictly as to require the exact words of

1882.

---

No. 3.  
M'Donald  
v.  
White.

---

High Court,  
June 9.

---

Suspension.



1882.

No. 3.  
M'Donald  
v.  
White.

High Court,  
June 9.

Suspension.

Statute is what I am not prepared to do. I am therefore not prepared to sustain the objection to the relevancy.

The other objection stated to the conviction is thus set forth in the print before us—‘The complainer also objected to the proceedings being brought in the Police Court on the ground that the complainer’s titles and relative plans produced in Court, and hereafter referred to, disclosed the fact that the alleged obstruction was upon and within his own private property, and that he was entitled, in the exercise of his right in the property, to place thereon the boards, shrubs, and flowers referred to. That a question of heritable right being involved, a Police Court was not the proper tribunal to determine such right.’ Now, I think that there is not here raised a question of heritable right. The question is one of fact—whether the spot upon which the stall was placed was or was not part of a street, whether public or private? It appears to me to be no answer at all to say that the ground had at one time been the property of the complainer, if he had afterwards admitted the public to have access to it and to use it as a street. The Magistrate was of opinion that it was part of the High Street, and I see no ground for interfering with his judgment upon that point. We offered to the complainer an opportunity of having his rights ascertained in a superior Court by showing that it did not form part of the street,—that he had never allowed the public so to use it,—but he did not choose to avail himself of that offer. I see therefore no reason for interfering with the judgment complained of on the ground that this was private property, and that the case involved a question of heritable right. I am therefore for refusing to sustain this objection also, and for dismissing the Bill.

LORD YOUNG.—I concur with Lord Adam. It is quite true that the Statute contains the words ‘to the obstruction, annoyance, or danger of the residents and passengers,’ and provides that ‘every person who, in any street or private street, to the obstruction, annoyance, or



danger to the residents or passengers, places or leaves any furniture, goods, wares, or merchandise, or any cask, &c., on any footway,' shall be liable to a certain penalty. These are the whole words of the provision, bringing together all that is necessary to make it intelligible; and it must appear on the face of the complaint, or of the conviction, that what was left on the footway was to the obstruction or annoyance or danger of the residents or the passengers. These are alternative conditions, and the complaint need not set them all forth; and if the conviction set them all forth it might possibly be void from uncertainty. But it must appear that what was placed on the footway was to the obstruction or the annoyance or the danger of the residents or passengers. Now, does this not appear here? If the complaint had stated that the suspender had placed his goods on the street to the obstruction of the passengers, that would have been using the very words of the Statute, and would have been unexceptionable. But is it not the same thing to say that he caused an obstruction on the footpath? Who possibly could be obstructed but passengers or residents? I should hardly think it a reasonable thing to say that the word obstruction could be used without thereby meaning the obstruction either of the residents or of the passengers. No other reasonable construction of the complaint can possibly be suggested. I therefore think the complaint ought to be sustained as relevant. I cannot for a moment assent to the view that it is necessary to set forth or to show that some residents or passengers had in fact been obstructed, annoyed, or endangered. If a person were to dig a trench in a street, and then leave the street in that condition all night, I cannot doubt that that would be an obstruction or a danger, although nobody chanced to fall into the trench. It is the nature and character of the thing that makes it an obstruction, not its actual results. It is an obstruction, if it necessarily causes obstruction to passengers who chance to be there. Indeed the

1882.

---

No. 8.  
M'Donald  
v.  
White.

---

High Court,  
June 9.

---

Suspension.

1882. alternative in the Statute between passengers and residents shows that this is the true view, for a resident, who is not also a passenger, cannot actually be obstructed. It is in order to prevent obstruction in fact that a penalty is imposed on those who create possible and, if there should in fact be passengers, necessary sources of obstruction. On this question, therefore, I concur with Lord Adam. I think that the complaint is substantially, almost literally, in the words of the Statute.

No. 8.  
M'Donald  
v  
White.  
High Court,  
June 9.  
Suspension.

On the other point also I agree with Lord Adam. The *solum* of any street may be the private property of an individual. It may suit the convenience of private individuals to turn their property into streets. That frequently occurs. But having become a street *de facto*, it must be regulated by those provisions and bye-laws which are considered to be necessary for the safety of those passengers whom the proprietor has invited to frequent it. It must be subject to the police rules, and one of these rules is that there shall be no obstruction to those who are invited to make use of the street. There are many such private streets, the *solum* of which may be reconverted into its former private uses whenever the proprietor pleases. Now, here the magistrate was of opinion that the ground on which this obstruction was placed was *de facto* part of a street, and in this suspension we must take the fact to be so. There may be something in the contention that the street at this particular point widens, and in consequence that the ground in dispute does not belong to the street at all. We proposed, therefore, to the suspender that if the matter was of such importance to him he might take the question before a higher tribunal, proceeding in a more solemn manner, to have his rights there determined. But this he declined to do, acting no doubt on good advice, on the ground that the matter was not sufficiently valuable to him to make it expedient to incur the expense. What then does he ask us to do? He asks us

to look at the plans, and then to say that the magistrate has erred. But, looking at the plans, I cannot say that the magistrate has erred. I therefore think there was an obstruction here on the public street, and that the conviction must be sustained.

1882.  
No. 3.  
M'Donald  
v.  
White.  
High Court,  
June 9.  
Suspension.

The following was the Interlocutor :—  
' *Edinburgh, 9th June 1882.*—Having considered this Bill, and heard counsel for the parties, Refuse the Bill : Find the respondent entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the complainer.'

Agent for the Suspender—THOMAS M'NAUGHT, S.S.C.  
Agent for the Respondent—R. PASLEY STEVENSON, S.S.C.

WEST CIRCUIT.  
GLASGOW.

HER MAJESTY'S ADVOCATE—*Henderson, A.D.*  
AGAINST  
THOMAS DEVANEY—*James Reid.*

RELEVANCY—MINOR PROPOSITION, SUBSUMPTION OF—AGGRAVATION.  
—Objection to an indictment, which charged assault aggravated *inter alia* by being committed by discharging loaded firearms, that although this aggravation was set forth in the affirmation at the commencement of the minor proposition the subsumption did not contain an averment that firearms had been discharged, sustained, and the aggravation allowed to be struck out on the motion of the prosecutor.

THOMAS DEVANEY was charged before the Circuit Court held at Glasgow on 20th June 1882 with 'assault' at common law, especially when committed to the 'injury of the person, and more especially when committed by means of presenting loaded firearms at any of the lieges, to their great terror and alarm and injury

No. 4.  
Thomas  
Devaney.  
Glasgow,  
June 20.  
Assault, &c.

1882. of the person, *and by discharging loaded firearms.*'

No. 4.  
Thomas  
Devaney.

Glasgow,  
June 20.

Assault, &c.

The indictment also contained the statutory charge of shooting with intent to injure under sec. 2 of 10 Geo. IV., c. 38.

The affirmation of the minor proposition was in the following terms:—'That you the said Thomas Devaney are guilty of the crime of assault at common law above libelled, aggravated by its having been committed by means of presenting loaded firearms at any of the lieges, to their great terror and alarm and to the injury of the person, *and by discharging loaded firearms*, and of the statutory crime and offence set forth in the 2d section of the Statute above libelled of wilfully, maliciously, and unlawfully shooting at any of Her Majesty's subjects.'

The narrative applicable to the common law charge stated that the panel 'did present at or towards the person of the said Thomas M'Binnie a revolver, pistol, or other kind of firearm, loaded with cartridges or powder and bullets,' but it was not said that the panel had discharged said pistol, and nothing was said about discharging. The indictment then went on to narrate the circumstances applicable to the statutory charge.

Objection was taken to the relevancy on the ground that *species facti* were not set forth to support the aggravation of *discharging loaded firearms* libelled in the major and affirmation of the minor, which was sustained, and the words 'by discharging loaded firearms' were, on the motion of the Advocate-Depute, struck out of the indictment.

Agent for the Panel.—WILLIAM B. PATERSON, Writer, Glasgow.

## HIGH COURT.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

JOHN LENNOX, Appellant—*Jameson*.

AGAINST

THOMAS FERGUSON, Respondent—*Keir*.

GROCEER'S LICENSE—BREACH OF CERTIFICATE—STATUTE 25 AND 26 VIC., c. 35—CERTIFICATE No. 3, SCHEDULE A ('Public Houses Acts Amendment (Scotland) Act, 1862')—PERMITTING LIQUORS TO BE CONSUMED ON PREMISES—CONVICTION—COMPLAINT.—A grocer, licensed to sell excisable liquors not to be consumed on the premises, in terms of 'The Public Houses Acts Amendment (Scotland) Act, 1862,' Certificate No. 3, Schedule A, having been convicted of permitting or suffering drink to be consumed on his premises, upon a complaint which charged the selling or supplying a gill of whisky, and the permitting the same to be drunk on his premises, the Court, on appeal, quashed the conviction, on the ground that the offence consisted in the trafficking in or giving excisable liquor for the purpose of being consumed there, and that the permitting by a grocer of a customer to test whisky on his premises while the purchase of a gallon was being made did not amount to a breach of the certificate.

THIS was an appeal at the instance of JOHN LENNOX, grocer in Stirling, who held a grocer's license to sell excisable liquors not to be drunk on the premises, in the form of Certificate No. 3, Schedule A, annexed to the 25 and 26 Vic., c. 35, 'The Public Houses Acts Amendment (Scotland) Act, 1862,' against a conviction and sentence pronounced in the Burgh Court there, upon a complaint at the instance of THOMAS FERGUSON, Procurator-Fiscal of Court, which charged a breach of the regulations of his certificate, in that he did, time libelled, 'within or near the grocer's shop or premises possessed by him at,' &c., 'sell or supply one gill or thereby of whisky or other excisable liquor to' two

1882.

No. 5.  
Lennox  
v.

Ferguson.

High Court,  
June 9.

Appeal.

1882.

No. 5.

Lennox  
v.

Ferguson.

High Court,  
June 9.

Appeal.

persons designed, 'and did permit or suffer the same to be drunk or consumed on the said premises, in breach of the regulations of his said certificate.'

The Magistrate stated in the Case on appeal that it was proved that on the day libelled two customers of the appellant went to his shop, and each gave an order for goods, one of the orders including *inter alia* a gallon of whisky. That some conversation took place at the time regarding the quality of the whisky, and one of the said customers proposed that the whisky should be tested; that thereupon the appellant brought a gill of whisky to the back shop, and while it was being there drunk two police officers entered, and the above charge was brought in consequence.

'The Magistrate, on the evidence led, convicted the appellant of "permitting or suffering drink to be consumed on the premises, in breach of the regulations of the certificate," and fined him twenty-five shillings and eight shillings of expenses, and failing payment within fourteen days, ten days' imprisonment.'

The questions of law for the opinion of the High Court of Justiciary were—

1. Whether the complaint sets forth relevantly a contravention of the regulations of the certificate?

2. Whether the conviction is bad, in respect it is disconform to the charge libelled and indefinite in itself?

3. Whether the facts proved warrant the conviction?

JAMESON, for the appellant.—The appellant's certificate is in the Form 3 in the Schedule annexed to the 25 and 26 Vic., c. 35, 'The Public Houses Acts Amendment (Scotland) Act, 1862,' one of the conditions in which is that the person licensed do not 'traffick, or give any spirits, wine, or excisable liquor, &c., to be drunk or consumed on the premises,' while the conviction of the appellant ran in these terms:—'The Magistrates, in respect of the evidence adduced, convict the said John Lennox of permitting or suffering drink to be consumed on the premises, in breach of the regulations in the

certificate referred to.' The complaint, on the other hand, charges the selling or supplying liquor on the occasion libelled to the persons named, and the permitting or suffering the same to be drunk on the premises. That is not a relevant averment of a breach of the regulation said to have been contravened. The regulation says he shall 'not traffic in or give,' &c. ; the complaint charges the selling or supplying. The words '*to be*' in the regulation mean, we contend, for the purpose of. The regulation means that he shall not traffic in or give liquor for the purpose of being, or in order that it may be, drunk on the premises. But in the complaint the words—'*and did permit or suffer the same to be drunk or consumed on the said premises,*' only follow the allegation that the appellant '*did sell or supply one gill or thereby of whisky.*' It is not charged in the complaint that the sale was made, or the whisky supplied for the purpose of being drunk on the premises, which is what constitutes the offence. *Bath v. White*, January 25th, 1878, III. L.R. Com. Pl. Div., p. 175. The offence does not consist in the selling to be afterwards drunk, but in the trafficking in, or giving for the purpose of being drunk on the premises. The complaint therefore does not relevantly set forth a contravention of the regulation of the certificate. And in like manner the conviction does not convict of the offence of breach of this regulation or condition. It is inconsistent with, and does not convict of what is charged in, the complaint. The charge is 'selling or supplying': the conviction is of permitting or 'suffering drink to be consumed on the premises.' The conviction, therefore, besides being disconform to the complaint, does not convict of a breach of the regulation or condition said to have been contravened. It does not find the appellant guilty of trafficking in, or giving liquor for the purpose of being drunk on the premises. Nor do the facts warrant the conviction. A grocer is quite entitled to allow a sample of his goods to be tested, and to give even excisable liquor to a customer for that pur-

1882.

No. 5.

Lennox

v.

Ferguson.

High Court,  
June 9.

Appeal.



1882.  
 —  
 No. 5.  
 Lennox  
 v.  
 Ferguson.  
 —  
 High Court,  
 June 9.  
 —  
 Appeal.

pose. That does not amount to trafficking in, for the purpose of being consumed.

KEIR, for the respondent.—The charge in the complaint of the selling of liquor, and the suffering to be drank on the premises in immediate conjunction with one another, is substantially the offence in the regulation contained in the schedule. The main element of the offence is the permitting the liquor to be consumed on the premises.

LORD YOUNG.—No. The breach of the regulation consists in the trafficking in or giving liquor to be consumed there. The grocer may supply to be drunk elsewhere, but not there. The regulation is not directed against all trafficking in liquor for consumption, but the trafficking in for the purpose of being consumed on the premises.

LORDS CRAIGHILL and ADAM concurred.

The following was the Interlocutor pronounced :—

‘*Edinburgh, 9th June 1882.*—Having considered this Case, and heard counsel for the parties, sustain the appeal : Reverse the determination of the inferior judge : Find the appellant entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent.

Agents for the Appellant—Messrs BOYD, MACDONALD, & JAMIESON, W.S.  
 Agents for the Respondent—Messrs FRASER, STODART, & BALLINGAL, W.S.

---

Present,

THE LORD JUSTICE CLERK.

LORDS MURE and CRAIGHILL.

HER MAJESTY’S ADVOCATE—*Brand, A.D., and Mackay, A.D.*

AGAINST

JAMES NICOL FLEMING—*Mackintosh and Jameson.*

BANK DIRECTORS—FRADULENT USING AND UTTERING, AS TRUE, FABRICATED AND FALSIFIED REPORTS AND BALANCE SHEETS BY BANK DIRECTORS—USING AND UTTERING REPORTS AND BALANCE SHEETS OF BANK — FALSEHOOD, FRAUD, AND WILFUL IMPOSI-



**TION—BREACH OF TRUST AND EMBEZZLEMENT.**—A bank director, who pleaded guilty to having used and uttered, as true, fabricated and falsified reports and balance sheets or statement of affairs, of the bank of which he was director, applicable to three consecutive years, knowing the same to be fabricated and false, for the purpose of concealing and misrepresenting the true state of the company's affairs, with intent to defraud, and whereby members of the company and of the public were deceived, imposed upon, and defrauded, sentenced to eight months' imprisonment.

**JAMES NICOL FLEMING**, formerly merchant in Glasgow, Calcutta, and Manchester, and now or lately residing at Manchester, was indicted and accused of the crimes of falsehood, fraud, and wilful imposition; as also the wicked and felonious fabrication and falsification, by directors or officials of a joint stock banking company, of any report or of any balance sheet or statement of affairs, for the purpose of concealing and misrepresenting the true state of the company's affairs, with intent to defraud, and wickedly and feloniously using and uttering such report or such balance sheet or statement of affairs as true, for said purpose, with intent to defraud, and whereby members of the company and of the public are deceived, imposed upon, and defrauded; as also the wickedly and feloniously using and uttering, as true, by the directors or officials of a joint stock banking company, any fabricated and falsified report or any fabricated and falsified balance sheet or statement of affairs, knowing the same to be fabricated and false, for the purpose of concealing and misrepresenting the true state of the company's affairs, with intent to defraud, and whereby members of the company and of the public are deceived, imposed upon, and defrauded; as also breach of trust and embezzlement:

1882.

---

 No. 6.  
 James Nicol  
 Fleming.

---

 High Court,  
 July 3.

---

 Using and  
 uttering as  
 genuine  
 False  
 Reports and  
 Balance  
 Sheets, &c.

IN SO FAR AS, you the said James Nicol Fleming having been, during the years 1873, 1874, and down to the 7th day of July 1875, and during several previous years, one of the directors of a joint stock banking company, registered under the Companies' Act, 1862, and carrying on the business of banking in Glasgow and elsewhere throughout Scotland under the name or firm of The City of Glasgow Bank, with a paid-up capital at 4th June 1873 of £870,000, which was

1882. increased on or about 31st July 1873 to the sum of one million pounds sterling; and it being your duty, as director foresaid, to see that regular books were kept for the business of the company, in which all its transactions, affairs, and obligations were duly entered; and it being farther your duty to see that every year a true and accurate abstract or statement of the company's affairs, made up from the company's books as balanced on the first Wednesday of June in each year, was prepared and duly examined, and thereafter at each annual general meeting of the members of the company, held on the first Wednesday of July in each year, reported for the satisfaction of all concerned: Yet nevertheless (1.), on one or more days in the month of June 1873, or of May immediately preceding, or of July immediately following, the time or times being more particularly to the prosecutor unknown, in or near the head office of the City of Glasgow Bank in Virginia Street, Glasgow, or elsewhere in or near Glasgow to the prosecutor unknown, you the said James Nicol Fleming did, acting in concert with the now deceased Alexander Stronach, who was then and had been for many years previously manager of the said company, wickedly and feloniously, with intent to defraud the members of the said company and the public, and for the purpose of concealing and misrepresenting the true state of the affairs of the said company, and of inducing members of the said company and the public to retain or acquire stock therein, and to become or continue depositors therein, concoct and fabricate, or cause or procure to be concocted and fabricated, a false and fabricated report, and also a false and fabricated abstract balance sheet or statement of affairs, purporting to represent the true condition of the bank's affairs as at 4th June 1873, which false and fabricated report, and false and fabricated abstract balance sheet or statement of affairs, were in the following or similar terms, *videlicet* :<sup>1</sup>

THIRTY-FOURTH ANNUAL REPORT by the DIRECTORS of the CITY OF GLASGOW BANK, to the SHAREHOLDERS, read at the Annual Meeting, 2nd July 1873.

The directors, in terms of the contract, submit for the approval of the shareholders, the thirty-fourth annual report on the bank's affairs, along with the usual abstract of balances, as at 4th June last.

---

<sup>1</sup> The charge in this and in the two following counts of the indictment was of fabricating and uttering a false report as well as a false abstract balance sheet. The similar charges in the indictment against the other directors of this bank was confined to the fabricating and uttering of false abstract balance sheets alone. See report of the case of John Stewart and others, City of Glasgow Bank Directors, High Court, Jan. 21, 1879, Couper, vol. iv., p. 164 *et seq.*

The result of the year's business is as follows :—

The 'reserve fund' or undivided profits, at last annual balance amounted to . . . . .	£280,000	0	0
The balance brought forward from last year at the credit of profit and loss account amounted to . . . . .	£17,004	15	4
Less income-tax on dividend paid to shareholders, in accordance with the resolution of last annual meeting, . . . . .	1,450	0	0
<hr/>			
Making the sum brought forward . . . . .	£15,554	15	4
The balance at the credit of profit and loss account for the year ending 4th June last amounts to . . . . .	114,734	14	3
<hr/>			
	130,289	9	7
<hr/>			
	£410,289	9	7

1882.  
No. 6.  
James Nicol  
Fleming.  

---

High Court,  
July 3.  

---

Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

From which the directors recommend,—

1st, That a dividend at the rate of 10 per cent. per annum, free of income-tax, be declared, payable 1st August and 3rd February next, and amounting to . . . . .	£87,000	0	0
2nd, That £20,000 be added to the reserve fund, making the amount . . . . .	300,000	0	0
3rd, That property account be further credited with the sum of . . . . .	10,000	0	0
4th, That the balance be carried forward at the credit of profit and loss account to next year, . . . . .	13,289	9	7
<hr/>			
	£410,289	9	7
<hr/>			

The directors have further to intimate, that Mr Robert Salmond now retires by rotation as an ordinary director, and, being eligible, they respectfully recommend his re-election.—By order of the directors,  
ALEX. STRONACH, *Manager*.

1882.

## CITY OF GLASGOW BANK.

No. 6.  
James Nicol  
Fleming.

High Court,  
July 3.

Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

## ABSTRACT BALANCE SHEET, AS AT 4TH JUNE 1873.

Dr.	LIABILITIES.	ASSETS.	Cr.
1. Deposits at the head office and branches, including balances at the credit of banking correspondents, - - £7,685,169 4 9		1. Bills of exchange, local and country bills, credit accounts, and other advances upon security, - - - - £7,748,276 19 2	
2. Bank notes in circulation in Scotland and the Isle of Man, - - - - 896,180 0 0		2. Advances on heritable property, and value of bank buildings and furniture, - 216,363 17 11	
3. Drafts outstanding, due, or with a currency not exceeding fourteen days, - - 225,951 5 0		3. Cash on hand—viz. gold and silver coin and notes of other banks at head office and branches, £993,270 6 11	
4. Drafts accepted by the bank and its London agents on account of home and foreign constituents, - 929,435 6 6		Government stocks, Exchequer bills, railway and other stocks and debentures, and balances in hands of banking correspondents, - 2,059,114 2 1	
Liabilities to the public, £9,736,735 16 6			3,052,384 9 0
5. Capital account, £870,000 0 0			
6. Reserve Fund, 280,000 0 0			
7. Profit & Loss, 130,289 9 7			
Liabilities to partners, - - - - 1,280,289 9 7			
	£11,017,025 6 1		£11,017,025 6 1

and the said abstract balance sheet or statement of affairs was false and fabricated, and was known by you to be so, in the following particulars, or part thereof, *videlicet* :—(1) The amount of deposits at the head office and branches, and balances at the credit of banking correspondents, under article 1 on the debtor side, was understated to the extent of £656,005, 10s. 4d. or thereby; (2) The amount of the bank notes in circulation in Scotland and Isle of Man, under article 2 on the debtor side, was understated to the extent of £7348 or thereby; (3) The amount of drafts outstanding, due or with a currency not exceeding fourteen days, and of drafts accepted by the bank and its London agents, under articles 3 and 4 on the debtor side, was understated to the extent of £973,300 or thereby; (4) The amount of bills of exchange, local and country bills, credit accounts, and other advances under article 1 on the creditor side, was understated to the extent of £1,559,227, 1s. 4d. or thereby; (5) The amount of cash on hand, viz., gold and silver coin, and notes of other banks, under article 3 on the creditor side, was understated to the extent of £7348 or thereby; (6) The amount of Government stocks, exchequer bills, railway and other stocks and debentures, and balances in hands of banking correspondents, under article 4 on the creditor side, was understated to the extent of £70,078, 9s. or thereby; (7) A reserve fund to the extent of £280,000 was stated to exist, while in reality no such fund existed; (8)<sup>1</sup> Bad and irrecoverable

<sup>1</sup> This particular was, it will be observed, made much more specific than had been possible in the corresponding particulars in the former indictment (see Couper, vol. IV. p. 165), as the sequestration proceedings against these large debtors had disclosed the extent of these bad and irrecoverable debts which increased during the last of the years libelled.

debts to an amount far exceeding the whole capital stock of the bank, and known by you the said James Nicol Fleming to be bad and irrecoverable, and in particular bad and irrecoverable debts due by you the said James Nicol Fleming, to the extent of £758,878, 17s. 7d. or thereby, and by the firm of Smith, Fleming and Company of London, of which firm John Fleming, brother of you the said James Nicol Fleming, was the principal partner, to the extent of £1,136,216, 16s. 5d. or thereby, and by the firm of James Morton and Company of Glasgow and London, to the extent of £1,379,400, 2s. 4d. or thereby, and by the firm of John Innes Wright and Company of Glasgow, and the partners thereof, to the extent of £251,159, 14s. 4d. or thereby, were included under article 1 on the creditor side, and so treated as subsisting and available assets of the company; And in the said report which was, and was known by you to be false and fabricated, the reserve fund or undivided profits at last annual balance was stated at £280,000, whereas in reality no such fund existed; the profits or earnings of the bank during the preceding year were stated, under the head of the balance at the credit of profit and loss account for the year ending 4th June last 1873, at the sum of £114,734, 14s. 3d. or thereby, whereas in reality no profits or earnings had been made during the said year; and the said company was falsely and fraudulently represented as being in a sound and prosperous condition, and capable of paying to its members a dividend at the rate of 10 per centum per annum, free of income tax, and of carrying forward to the credit of next year's profit and loss account a sum of £13,289, 9s. 7d., whereas the said company was truly incapable of paying to its members any dividend out of its profits, or of carrying forward any sum to the credit of next year's profit and loss account: FARTHER, on or about the 2d day of July 1873, in or near the Glasgow Chamber of Commerce in or near Virginia Street, Glasgow, you the said James Nicol Fleming, acting in concert as aforesaid, did, wickedly and feloniously, and with intent to defraud, use and utter the said false and fabricated report, and false and fabricated abstract balance sheet or statement of affairs appended to the said report, as true, by then and there issuing and reporting the same to the members of the said company at their annual general meeting, held within the Glasgow Chamber of Commerce aforesaid on said 2d July 1873, in which report you did, wickedly and feloniously, and falsely and fraudulently, represent and pretend that the said company was in a sound and prosperous condition, and capable of paying to its members a dividend at the rate of 10 per centum per annum, free of income tax, and of carrying forward to the credit of the next year's profit and loss account a sum of £13,289, 9s. 7d., and by authorising or causing the said report and abstract balance sheet or statement of affairs to be printed and published, and circulated throughout Scotland, and all this you did, well knowing the said re-

1882.

No. 6.

James Nicol  
Fleming.High Court,  
July 8.Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

1882.  
 —  
 No. 6.  
 James Nicol  
 Fleming.  
 —  
 High Court,  
 July 3.  
 —  
 Using and  
 uttering as  
 genuine  
 False  
 Reports and  
 Balance  
 Sheets, &c.

port and abstract balance sheet or statement of affairs to be false and fabricated, and for the purpose of concealing and misrepresenting the true state of the said company's affairs, and of inducing members of the said company and the public to retain or acquire stock therein, and to become or continue depositors therein; by all which, or part thereof, you did, wickedly and feloniously, deceive, impose upon, and defraud members of the said company and of the public, and induce said members of the company to retain the stock held by them therein, and many of the public, including Robert Craig, papermaker, residing at Craig Esk, in the parish of Newbattle, and county of Edinburgh; Hugh Locke Anderson, house painter in Glasgow, residing at Ava Cottage, Helensburgh; James Barr, contractor, residing at Clydeside, Uddingston, Lanarkshire; William Morrison, residing at Burnbank Gardens, Glasgow, John Carmichael, commission merchant, residing in or near Hillhead Gardens, Hillhead, Glasgow, John Bilsland, residing in or near Bath Crescent, Glasgow, and John Brown, wholesale confectioner, residing in or near Dowanhill Gardens, Glasgow, to acquire stock in the said company; and others of the public, including Thomson and Porteous, tobacco manufacturers in Edinburgh; Honeyman and Wilson, wholesale grocers in Edinburgh; Hamilton and Inches, jewellers in Edinburgh; Mossman and Watson, provision merchants in Edinburgh; and Robert Christie, grocer in Edinburgh, to become or continue depositors in the said bank, to the great loss and prejudice of the said members of the company and of the public.

LIKEAS (2.) [This count charged in similar terms the like offences with reference to the thirty-fifth annual report by the directors of the bank to the shareholders, read at the annual meeting on 1st July 1874, and with reference also to the abstract balance-sheet as at 3d June in that year.]

LIKEAS (3.) [This count in like manner charged the same offences in similar terms with reference to the thirty-sixth annual report by the directors of the bank to the shareholders, read at the annual meeting on 7th July 1875, and with reference also to the abstract balance-sheet as at 2d June 1875.]

Likeas (4), you the said James Nicol Fleming having been, during the period from the 1st day of July 1863 down to the 7th day of July 1875, a director of the said company, known under the name or firm of the City of Glasgow Bank, and you the said James Nicol Fleming during the period last above libelled, having been engaged in, or pretended to be engaged in, business as a merchant in Glasgow, within the offices or premises in or near Exchange Court, Exchange



Square, Glasgow, Buchanan Street, and St Vincent Street, Glasgow, successively occupied by you during the period last above libelled, and you having also been from or about the month of October in the year 1868 down to the said 7th day of July 1875, a partner of the firm of J. Nicol Fleming and Company of Calcutta, which went into liquidation on or about 1st January 1875, and you the said James Nicol Fleming having had, during the said respective periods, or parts thereof, an account or accounts current, and a credit account or accounts, and an open or marginal credit account, or open and marginal credit accounts, with the said banking company, which open or marginal or open and marginal credit account or accounts were, by arrangement between you and the said banking company, operated upon by the said firm of J. Nicol Fleming and Company of Calcutta, on your behalf, by the said firm drawing bills on the said banking company, which bills, after being indorsed by the said firm of J. Nicol Fleming and Company, were either sold or otherwise disposed of by them in Calcutta, or transferred by them to parties in London and elsewhere to the prosecutor unknown, and thereafter presented to, and accepted by, the said banking company, or were transmitted by the said J. Nicol Fleming and Company to you, and by you presented to and accepted by the said banking company, and were thereafter placed in your hands for the purpose of being discounted, and were by you, or by the said firm of James Morton and Company, or the said firm of John Innes Wright and Company, or the firm of Fleming, Galbraith, and Company of Manchester, of which you were a partner, or by other persons or firms to the prosecutor unknown, discounted on your behalf; and it being your duty as director foresaid not to allow overdrafts or advances on the foresaid accounts, or any of them, to be made without security, or upon security known by you to be wholly inadequate, and in particular not to allow any such overdrafts or advances to be made by or to you the said James Nicol Fleming, or on your behalf, or by or to any firm whereof you were at the time a partner; and further, it being your duty not to allow bills drawn or accepted by you, or on your behalf, or for which you were liable, to be discounted by the said banking company without security, or upon security known by you to be wholly inadequate, at a time or times when you were wholly unable to meet such bills, and to discharge the liability thereunder due to the said banking company when they came to maturity, and you the said James Nicol Fleming having, in your capacity as director foresaid, along with the other directors and officials of the said banking company, received from the depositors and other creditors of the said banking company large sums of money in trust, and for the purpose that the same might be employed in the ordinary business of banking: Yet nevertheless you the said James Nicol Fleming did, taking advantage of your

1882.

No. 6.

James Nicol  
Fleming.High Court,  
July 3.Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

1882.

No. 6.  
James Nicol  
Fleming.

High Court,  
July 8.

Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

official position as director foresaid, and acting in concert with the said deceased Alexander Stronach, and in pursuance of a wicked and felonious purpose to obtain and appropriate large sums of money belonging to the said banking company, or to the depositors and other creditors of the said banking company, for your own uses and purposes, and that without security, or upon security known by you to be wholly inadequate, on several or one or more occasions between the 7th day of June 1871, at which date you were indebted to the said banking company to the extent of £387,420, 14s. 11d. or thereby, and the 2nd day of June 1875, the time or times being more particularly to the prosecutor unknown, in or near the head office of the said banking company in or near Virginia Street aforesaid, or elsewhere in or near Glasgow to the prosecutor unknown, wickedly, feloniously, and fraudulently, increase your liability or indebtedness to the said banking company, and that without security, or upon security known by you to be wholly inadequate, to the extent of £643,511, 7s. 9d. or thereby, so that it amounted in all at the date last mentioned to the sum of £1,030,932, 2s. 8d. or thereby, and that (1.) By making, or causing to be made, overdrafts, or by obtaining, or causing to be obtained, advances upon your accounts current and credit accounts with the said banking company to the extent of £455,539, 16s. 3d. or thereby; (2.) By obtaining, or causing to be obtained, advances to you or on your behalf by the said banking company, by means of obtaining or causing to be obtained the acceptances of bills by the said banking company, which bills were drawn upon open and marginal or upon open or marginal credit accounts with the said banking company on your behalf, to the extent of £197,919, 5s. 7d. or thereby; and (3.) By obtaining or causing to be obtained, the discount of bills drawn or accepted by you, or on your behalf, from the said banking company, to the extent of £2952, 5s. 9d. or thereby; amounting said three several sums last mentioned to the sum of £656,411, 7s. 9d., under a deduction of £12,900, being a decrease of acceptances by you discounted by third parties with said banking company during the period above libelled, leaving as balance the said sum of £643,511, 7s. 9d. or thereby; and all this you, being a director of the said banking company, did, although you well knew that you were insolvent at and prior to the said 7th day of June 1871, and that you continued to be insolvent during the whole period thereafter down to the 2nd day of June 1875, during which period you were thus increasing your said liability or indebtedness to the said banking company, and that you were unable to satisfy or meet your said liability or indebtedness, which liability or indebtedness has never, in point of fact, been satisfied or met by you, and you the said James Nicol Fleming did thereby, time or times and place or places respectively above libelled, wickedly and feloniously, and in breach of the trust reposed in you as aforesaid, and of your duty as director



foresaid, embezzle and appropriate to your own uses and purposes, the said sum of £643,511, 7s. 9d. sterling or thereby, or part thereof, received by and entrusted to you as aforesaid, the property of the said banking company, or of the depositors and other creditors of the said banking company: And you the said James Nicol Fleming being conscious of your guilt in the premises did abscond and flee from justice: And you the said James Nicol Fleming having been apprehended and taken before Francis William Clark, Esquire, advocate, sheriff of Lanarkshire, did, in his presence at Glasgow, on the 25th day of January, and the 13th day of May 1882, respectively, emit and subscribe a declaration, &c.

1882.

No. 6.

James Nicol Fleming.

High Court, July 3.

Using and uttering as genuine False Reports and Balance Sheets, &amp;c.

Upon the case being called, and the panel asked whether he pleaded guilty or not guilty—

MACKINTOSH, for the panel, said—The panel pleads guilty to using and uttering as libelled under the first, second, and third charges of the indictment, *quoad ultra* he pleads not guilty. The plea is exactly in the same terms as the finding of the jury at the trial of the other directors of the City of Glasgow Bank.

The LORD JUSTICE CLERK.—That is to say for issuing the Bank reports for 1873, 1874, and 1875.

MACINTOSH, for the panel.—Exactly so.

BRAND, A.D.—I accept that plea.

MACKINTOSH, for the panel, in mitigation of sentence, said—The panel does not plead guilty to the charge of falsifying and fabricating the balance sheets of the Bank, and he disclaims emphatically all connection with those manipulations of the headings and figures of the abstract balance sheets for which two of the directors formerly tried were convicted, and suffered punishment. The plea also does not include the charge of breach of trust and embezzlement, which charge was also preferred against certain of the directors of the former trial, and was also as against them withdrawn. The only charge which is proved, and the only charge to which the plea extends is the charge of which Messrs Stewart, Taylor, Salmond, Inglis, and Wright were convicted at the former trial, the charge, viz., of issuing balance sheets, knowing that the same did not disclose the true con-

1882.

No. 6.  
James Nicoll  
Fleming.

High Court,  
July 3.

Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

dition of the bank's affairs. The panel feels that whatever may have been the sanguine anticipations of himself and others in the years 1873, 1874, and 1875 he cannot now defend the inclusion as good assets in the balance sheets of these years of the large outstanding accounts referred to in the indictment, which were then due to the bank. In short he now feels it impossible to justify upon grounds which a jury would think reasonable the treatment in the accounts of these debts in those years as good and recoverable assets. And my Lords having thus defined the exact limit of the offence covered by the plea, and with which your Lordships have to deal, I desire to add on Mr Fleming's behalf that he is very far from justifying or extenuating the offence which he has committed. Whatever may have been his motives, however sanguine he may have been as to the ultimate issue of the bank's troubles, he admits, and most fully admits, that what he did was altogether wrong and unjustifiable. But at the same time, I am sure I need not recall to your Lordships' minds the distinction which exists, and which was pointed out and emphasised by your Lordship in the chair in pronouncing sentence at the last trial—the distinction, namely, between deceit practised from corrupt motives and for the purpose of personal gain, and concealment, or, it may be, deceit employed for the supposed benefit of the persons deceived, and in the hope of averting a great public disaster. I am confident that your Lordships will not lose sight of that distinction, and I think I may also count upon your Lordships not losing sight of another matter—the punishment which this unfortunate gentleman has already suffered. I don't refer to the downfall of his own fortunes, although, I am informed, it is, in point of fact, the case that when he joined the bank he did so, not of his own desire, but at the solicitation of others. He had retired from business with a realised fortune of no less than £300,000. But I rather refer to the physical and mental suffering which he has undergone, and undergone

continuously, since the year 1878. As your Lordships probably know, acting upon what I think was mistaken advice, he left this country when the bank stopped. He had been advised that, in the then state of the public mind, he could not depend upon having his case calmly considered. From that time till lately, when he returned to this country voluntarily, openly prepared if necessary to stand his trial, he lived in exile, separated from his friends, in broken health, and struggling with, I am afraid, but scant success to earn a livelihood. Your Lordships can well imagine what all this must have implied to a man of his temperament and his antecedents. I don't think I exaggerate when I say that the punishment, the suffering which this gentleman has already endured, is greater than would be involved in any punishment which your Lordships might inflict.

Mr MACKINTOSH then read the reports of two medical men, which testified that Mr Fleming was suffering from nervous prostration, and in a weak and unsatisfactory state of health, attributable to the protracted mental worry and anxiety which he had suffered since the failure of the bank.

The LORD JUSTICE-CLERK (addressing the prisoner), said—James Nicol Fleming, you have pleaded guilty to the three first charges of uttering to the shareholders of the City of Glasgow Bank reports which you knew to be untrue and misleading. I need say nothing of the other charges in the indictment, as they are not pressed against you. In regard to the offence to which you have pleaded guilty, and which, through your counsel, you have characterised not too strongly, some observations have been made by the counsel who has addressed us in mitigation of punishment in reference to the remarks which fell from me upon a former occasion, when the affairs of this City of Glasgow Bank were under our consideration. I then drew a distinction in pronouncing sentence upon other directors of this bank, for not only a similar but an identical offence—between those who

1882.

---

 No. 6.  
James Nicol  
Fleming.

---

 High Court,  
July 3.

---

 Using and  
uttering as  
genuine  
False  
Reports and  
Balance  
Sheets, &c.

1882.  
 No. 6.  
 James Nicoll  
 Fleming.  
 High Court,  
 July 3.  
 Using and  
 uttering as  
 genuine  
 False  
 Reports and  
 Balance  
 Sheets, &c.

may, in such circumstances, commit the offence knowing perfectly well that the statements made are not true, but borne on by a desire to stave off or avoid for a time the ruin of the shareholders, and those who commit the same offence for the sake of personal gain. The distinction, in my opinion, is a perfectly well founded one for the purpose for which I used it, and I don't think any one capable of judging of such a matter would for a moment think I intended to hold out to gentlemen acting as directors of such companies, and having in their hands sometimes an enormous amount of the interests of others, that it was anything but a very grave and heinous offence, whatever the motive, whatever the interest, however fair and plausible might be the grounds upon which it might be committed. I say no one would suppose that I held out the view that falsifying accounts, which might involve the ruin of hundreds of families, was anything but a very serious criminal offence. We have considered well, and, with the example of the former case before us, taking into account all your counsel has said, we are of opinion that the sentence which was pronounced then will be appropriate now. You will be imprisoned for eight calendar months.

Sentence accordingly, eight months' imprisonment.

---

Present,

THE LORD JUSTICE-CLERK and LORD CRAIGHILL.

HER MAJESTY'S ADVOCATE—*Brand, A.D.—Mackay, A.D.*

AGAINST

WILLIAM WILSON—*J. Campbell Smith.*

FRAUDULENT DEBTOR—BANKRUPT—FRAUDULENT CONCEALMENT OF PROPERTY—THEFT OF GOODS OBTAINED ON APPROBATION—PROPERTY—POSSESSION—FALSEHOOD, FRAUD, AND WILFUL IMPOSITION—FALSIFYING BUSINESS BOOKS—STATUTE 43 AND 44 VIC., c. 34, SEC. 13, SUB-SECS. 3, 4, AND 5, The Debtors (Scotland) Act, 1880—PAWNING, PLEDGING, OR DISPOSING OF OTHERWISE THAN IN THE

ORDINARY WAY OF TRADE—INDICTMENT—RELEVANCY.—A retail jeweller having obtained articles of jewellery on approbation or on sight from a wholesale jeweller, by means of false and fraudulent representations and pretences, and by exhibiting business books containing false entries, systematically pawned them, and on being charged with theft, or alternatively with falsehood, fraud, and wilful imposition, he objected to the relevancy of the charge of theft that the property of the articles having passed he committed no theft by pawning them. Held that the property had not passed, and the objection repelled. Objection also that false representations and pretences libelled were not such as could deceive, and, at all events, were not sufficiently specific, as, especially, it was not set forth wherein the falsification consisted, repelled.

Objections to the relevancy of charges of having contravened section 13 of 'The Debtors (Scotland) Act, 1880,' sub-sections 3, 4, and 5, that the minor proposition of the indictment was vague, and not sufficiently specific in various particulars, repelled; but observed that the charges were not correctly libelled.

Question—Whether the offence in sub-section 5 of section 13 of 'The Debtors (Scotland) Act, 1880,' is relevantly libelled by using the alternatives in the Statute, and charging that the panel—a debtor in a process of sequestration—did, within the time specified in the Act, *pawn, pledge, or dispose of otherwise than in the ordinary way of trade*, the articles libelled, being property obtained on credit and which had not been paid for, or whether the particular mode in which the property was disposed of must be specified?

WILLIAM WILSON, now or lately prisoner in the prison of Edinburgh, was indicted and accused of the crime of theft, as also falsehood, fraud, and wilful imposition: And albeit, by an Act passed in the 43d and 44th years of Victoria, chapter 34, entitled 'The Debtors (Scotland) Act, 1880,' it is by section 13 thereof enacted that 'The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the sheriff without a jury for any time not exceeding sixty days, with or without hard labour—(A) In each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud, that is to say—1. If he does not to the best of

1882.

No. 7.

Wm. Wilson.

High Court,  
July 3.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

1882. his knowledge and belief fully and truly disclose the state  
 No. 7. of his affairs in terms of "The Bankruptcy (Scotland) Act,  
 Wm. Wilson. 1856," or the Cessio Acts, as the case may be ; 2. If he  
 High Court, does not deliver up to the trustee all his property, and  
 July 3. all books, documents, papers, and writings relating to his  
 Cont. of property or affairs which are in his custody or under his  
 'The control, and which he is required by law to deliver up,  
 Debtors (Scotland), or if he does not deal with and dispose of the same  
 Act, 1880, according to the directions of the trustee ; 3. If after the  
 sec. 13, presentation of the petition for sequestration or cessio, or  
 sub-seca. (A) within four months next before such presentation, he  
 3, 4, and 5. conceals any part of his property, or conceals, destroys,  
 or mutilates, or is privy to the concealment, destruction,  
 or mutilation of any book, document, paper, or writing  
 relating to his property or affairs ; 4. If, after or within  
 the time above specified, he makes, or is privy to the  
 making of any false entry in, or otherwise falsifying any  
 book, document, paper, or writing affecting or relating to  
 his property or affairs ; 5. If within four months next  
 before the presentation of the petition for sequestration  
 or cessio, *he pawns, pledges, or disposes of, otherwise  
 than in the ordinary way of trade*, any property which  
 he has obtained on credit and has not paid for ; 6. If,  
 being indebted to an amount exceeding two hundred  
 pounds, at the date of the presentation of the petition for  
 sequestration or cessio as the case may be, he has not for  
 three years next before such date kept such books or  
 accounts as, according to the usual course of any trade  
 or business in which he may have been engaged, are  
 necessary to exhibit or explain his transactions.'—  
 That he the said William Wilson was guilty of the said  
 crime of theft, and of the said crime of falsehood, fraud,  
 and wilful imposition, or one or other of them, and of the  
 crime and offence set forth in the above recited 13th  
 section of the said Act, sub-section (A) 3, of the crime  
 and offence set forth in the above recited 13th section of  
 the said Act, sub-section (A) 4, and of the crime and  
 offence set forth in the above recited 13th section of the



said Act, sub-section (A) 5, or of one or more of the said statutory crimes and offences :

IN SO FAR AS (1), you the said William Wilson having, during the period between May 1880 and 22nd November 1881, or the greater part thereof, carried on business as a goldsmith, jeweller, and watch-maker, in premises in or near Princes Street, Edinburgh, under the name or style of William Wilson, junior, you the said William Wilson did, on an occasion in the month of December 1880 or January 1881, and on various or one or more subsequent occasions prior to the 20th day of October 1881, the particular subsequent occasions being to the prosecutor unknown, in or near the said shop or premises in or near Princes Street, Edinburgh, then occupied by you, wickedly and feloniously, falsely, fraudulently, and wilfully, represent and pretend to Samuel Bradley, then and now or lately jeweller and watch merchant in or near Vyse Street, Birmingham, and now or lately residing, &c., that you were doing a large business, that your sales averaged about £400 a month, that various articles of jewellery ordered by you from him were required to meet orders received from customers, and that various articles purchased from him by you, or sent by him to you on approbation or on sight, had been sold by you, and in order the more readily to deceive and impose upon the said Samuel Bradley, you did, on the said occasions, or on one or more of them, exhibit to him a day book or day books, or other business books kept by you, containing several or one or more false and fictitious entries of sales of goods, well knowing said entries to be false and fictitious ; and you having, by means of the said or similar false and fraudulent representations and pretences, and by the exhibition of the said day book or day books, or other business books, containing false and fictitious entries as aforesaid, deceived and imposed upon the said Samuel Bradley, and induced him to send or deliver to you on approbation or on sight, at the said shop or premises in or near Princes Street, Edinburgh, then occupied by you as aforesaid, on or about the dates specified in the first column of Schedule I. hereto annexed and referred to, the articles respectively entered or set opposite to the said dates, and specified in the second column of the said Schedule I., you not making or intending to make payment for, or return the same ; and you the said William Wilson did, on various occasions between the 27th day of May and 22nd day of November 1881, the particular occasions being to the prosecutor unknown, in or near the pawn office or premises in or near Milne Square, Edinburgh, then and now or lately occupied, &c., or in or near the said shop or premises in or near Princes Street, Edinburgh, then occupied by you, wickedly and feloniously, steal and theftuously away take the articles set forth in the second column of the said schedule, the property or in the lawful possession of the said

1882.

---

 No. 7.  
 Wm. Wilson.

---

 High Court,  
 July 3.

---

 Cont. of  
 'The  
 Debtors  
 (Scotland)  
 Act, 1880,'  
 sec. 13,  
 sub-seca. (A)  
 3, 4, and 5.

1882. Samuel Bradley ; or otherwise, you the said William Wilson did, by  
 No. 7. the foresaid or similar false and fraudulent representations and pre-  
 Wm. Wilson. tences, and the exhibition of the said day book or day books, or other  
 High Court, business books containing false and fictitious entries as aforesaid,  
 July 3. deceive and impose upon the said Samuel Bradley, and induce him  
 Cont. of to send or deliver to you on approbation, or on sight, at the said shop  
 'The Debtors or premises in or near Princes Street, Edinburgh, then occupied by  
 (Scotland) you, on or about the dates specified in the first column of the said  
 Act, 1880, schedule, the articles respectively entered or set opposite the said  
 sec. 13, dates, and specified in the second column of the said schedule, the  
 sub-secs. (A) property or in the lawful possession of the said Samuel Bradley, you  
 3, 4, and 5. not making or intending to make payment for or return the same,  
 and you the said William Wilson did, on or about the dates specified  
 in the first column of said schedule, in or near the shop or premises  
 in or near Princes Street, Edinburgh, then occupied by you, wickedly  
 and feloniously, receive and appropriate to your own uses and pur-  
 poses the articles set forth in the second column of the said schedule,  
 and did dispose of them on various occasions between the 27th day  
 of May and 22nd day of November 1881, the particular occasions  
 being to the prosecutor unknown, by pawning or pledging the same  
 in the pawn office or premises in or near Milne Square, Edinburgh,  
 then and now or lately occupied by the said Equitable Loan Com-  
 pany of Scotland, or in or near the pawn office or premises in or near  
 South Bridge, Edinburgh, then and now or lately occupied by the  
 said Michael Flannigan, and the said Samuel Bradley was thus wil-  
 fully imposed upon and defrauded by you :

Likeas (2) and Likeas (3). These counts contained similar charges of the theft, or alternatively the fraudulent appropriation of, in the second count, a diamond ring, and, in the third count, a cat's eye diamond pin, obtained from the said Samuel Bradley by the same false and fraudulent representations and pretences.

Likeas (4), you the said William Wilson having become indebted to the said Samuel Bradley, Peter Westren, goldsmith, in or near Frederick Street, Edinburgh, and now or lately residing in or near Priestfield Road, Edinburgh, the firm of Crozier and Martin, whole-sale jewellers, in or near &c., Birmingham, or one or more of them, and various other persons and firms, and you having been insolvent for at least four months immediately prior to 22nd November 1881, and you having, on *or about* 22nd November 1881, presented to the Court of Session a petition at your instance, with concurrence of the said Peter Westren, for sequestration of your estates, and the Lord Ordinary officiating on the Bills, on considering the said petition, having, on the said 22nd November 1881, sequestrated the estates then belong-



ing, or which might thereafter before the date of your discharge belong to you, and declared the same to belong to your creditors for the purposes of 'The Bankruptcy (Scotland) Act 1856,' and 'The Bankruptcy and Real Securities' (Scotland) Act, 1857,' and you the said William Wilson having thus become debtor in a process of sequestration within the meaning of the above recited Act, 43 and 44 Victoria, chapter 34, section 13, you did, *on several occasions* between the 22nd day of July and 22nd day of November 1881, the particular occasion being to the prosecutor unknown, but being within four months next before the presentation of said petition for sequestration of your estates, in or near the pawn office or premises in or near Milne Square, Edinburgh, then and now or lately occupied by the said Equitable Loan Company of Scotland, or in or near the pawn office or premises in or near South Bridge, Edinburgh, then and now or lately occupied by the said Michael Flannigan, you the said William Wilson did pawn, *pledge, or dispose of*, otherwise than in the ordinary way of trade, the articles enumerated in the first column of Schedule II. hereto annexed and referred to, being property which you had obtained on credit from the said Samuel Bradley on or about the dates set forth in the second column of the last mentioned Schedule opposite to said articles, and had not paid for, and this you did with intent to defraud your creditors, or one or more of them: Likeas (5), on or about the dates specified in the first column of Schedule III. hereto annexed and referred to, being within four months next before presentation of the said petition for sequestration of your estates, in or near the places set forth in the second column of said Schedule III. opposite to the said dates, you the said William Wilson did pawn, *pledge, or dispose of*, otherwise than in the ordinary way of trade, the articles set forth in the third column of the said last mentioned Schedule opposite to the said dates and places, being property which you had obtained on credit from the persons and firms whose names and designations are set forth in the fourth column of said last mentioned Schedule opposite to the said dates, places, and articles, on or about the dates set forth in the fifth column of said last mentioned Schedule opposite the said dates, places, articles, and names and designations respectively, and had not paid for, and this you did with intent to defraud your creditors, or one or more of them: Likeas (6), on an occasion or occasions between the 22nd day of July and 22nd day of November 1881, the particular occasion or occasions being to the prosecutor unknown, but being within four months next before the presentation of the foresaid petition for sequestration of your estates, in or near the shop or premises in or near Princes Street, Edinburgh, then occupied by you, or elsewhere in or near Edinburgh to the prosecutor unknown, you the said William Wilson did mutilate, or were privy to the mutilation of, your day book commencing on or about 25th May 1880 and ending

1882.

No. 7.

Wm. Wilson.

High Court,  
July 3.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

1882. on or about 31st December 1880, and of your day book commencing  
 No. 7. on or about 3rd January 1881 and ending on or about 7th December  
 Wm. Wilson. 1881, or of one or other of said books, the same being books relating  
 High Court, to your property or affairs, by tearing off or cutting out certain  
 July 3. portions *from numerous leaves thereof*, and thereby removing the  
 Cont. of figures contained thereon, or those setting forth the summations in  
 'The the money columns on the said leaves, *and in many places sub-*  
 Debtors *stituting other entries therefor; and also by erasing a large number*  
 (Scotland) *of entries and substituting other entries in their place;* and this  
 Act, 1880, you did with intent to defraud your creditors, or one or more of  
 sec. 13, them, by preventing or endeavouring to prevent them ascertaining  
 sub-secs. (A) from your said books the true state of your affairs, and the true  
 3, 4, and 5. nature of the transactions recorded therein, and in particular by  
 deceiving the said Samuel Bradley as to your affairs, with a view  
 to his furnishing you with further goods on credit: Likeas (7),  
 time last above libelled, being within four months next before the  
 presentation of the foresaid petition for sequestration of your estates,  
 in or near the said shop or premises in or near Princes Street, Edin-  
 burgh, then occupied by you, or elsewhere in or near Edinburgh  
 to the prosecutor unknown, you the said William Wilson did  
 make, or were privy to the making of, a false or fictitious entry  
 or entries in, or otherwise falsifying your day book commencing on  
 or about 3rd January 1881, and ending on or about 7th December  
 1881, being a book affecting or relating to your property or affairs,  
 by making and inserting statements of jewellery and other goods  
 having been sold when no sales had taken place, and no order what-  
 ever had been given by any one with reference to the same; and in  
 particular, the following entries made by you in the foresaid day  
 book, or to the making of which you were privy, are false and  
 fictitious, viz. [Here followed the specification of nineteen entries], and  
 this you did with intent to defraud your creditors, or one or more of  
 them: Likeas (8), on an occasion in the month of October 1881, the  
 particular occasion being to the prosecutor unknown, being within  
 four months next before the presentation of the said petition for  
 sequestration of your estates, you the said William Wilson did  
 conceal, in or near the house or premises in or near Yeaman Place,  
 Edinburgh, then and now or lately occupied by Andrew Carrick, shop  
 porter, then and now or lately residing there, or by Peter Carrick,  
 baker, then and now or lately residing there, part of your  
 property, consisting of [Here followed a specification of thirty-nine  
 articles], and this you did with intent to defraud your creditors,  
 or one or more of them, by concealing *or endeavouring to conceal*  
 the fact that the said articles formed part of your estates:  
 Likeas (9), on the 22d or 23d day of November 1881, or on one  
 or other of the days of that month, or of October immediately pre-  
 ceding, or of December immediately following, being after or within

four months next before the presentation of the said petition for sequestration of your estates, you the said William Wilson did conceal in the wareroom or premises in or near Shandwick Place, Edinburgh, then and now or lately occupied by Edward Cruttenden, then and now or lately upholsterer there, part of your property, and consisting of [Here followed a specification of thirteen articles of furniture], and this you did with intent to defraud your creditors, or one or more of them, by concealing *or endeavouring to conceal* the fact that the said articles formed part of your estates: and you the said William Wilson having been apprehended, &c.

1882.  


---

No. 7.  
Wm. Wilson.  


---

High Court,  
July 3.  


---

Cont. of  
‘The  
Debtors  
(Scotland)  
Act, 1880,’  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

J. CAMPBELL-SMITH objected to the relevancy—First, of the common law charges of theft, and falsehood, fraud and wilful imposition, as contained in the first three counts in the minor proposition. These counts charge the panel with having obtained certain articles of jewellery from a Birmingham dealer on approbation or on sight by means of what are irrelevantly said to be false and fraudulent representations and pretences, but which are altogether insufficient to deceive or impose upon any one. These counts also do not contain proper charges of theft. It is said that by means of these false representations and pretences the panel obtained the articles on approbation or on sight; and that is a contract which passes the property, and out of which theft cannot arise. M.P., *Brown v. Barclay and others and Crichton and others*, June 8, 1880, *Rettie*, vol. vii. p. 427. That was a multiplepinding raised in name of the Procurator Fiscal of Lanarkshire in reference to the right to certain watches and articles of jewellery which had been obtained by a person of the name of Marr, a retail jeweller, from wholesale jewellers in Glasgow, on contracts similar to that in the present case, viz., on contracts of sale and return, and which had been pawned and subsequently recovered by the police from the pawnbrokers for the purposes of a prosecution for theft, and falsehood, fraud, and wilful imposition. And it was held in a question between the wholesale jewellers and the pawnbrokers that the latter were entitled to retain possession of the watches (1) on the ground that the

1882.  
 No. 7.  
 Wm. Wilson.  
 High Court,  
 July 3.  
 Cont. of  
 'The  
 Debtors  
 (Scotland)  
 Act, 1880,  
 sec. 13,  
 sub-secs. (A)  
 3, 4, and 5.

goods had been sold to the retail dealer, and that he had therefore a title to dispose of them, and (2) *separatim*, that the goods having been voluntarily entrusted to a recognised trader by the owners they were not entitled to reclaim them from the *bona fide* onerous pledgees.

The LORD JUSTICE CLERK.—That case was very different from the present. There was no fraud there. It was a case of a contract of sale and return, and that implies an honest contract. In the present case the goods were obtained by fraud.

J. CAMPBELL SMITH for the panel.—There is also the Case of *Cowan v. M'Minn*, High Court, June 8, 1859, *Irv.*, vol. iii. p. 312.

LORD JUSTICE-CLERK.—I thought you were contending that the property had passed to the panel.

J. CAMPBELL SMITH.—There may be a question whether the civil possession gave a right of property. The panel got the possession of the goods in the expectation that he was going to sell them, and it is said that he obtained them by fraud, and that he subsequently pawned them and so stole them, or otherwise that he was guilty of falsehood, fraud, and wilful imposition, and what we contend is, that the charges are in the circumstances inconsistent—that the panel cannot consistently be said to have obtained the possession both by theft and by fraud; and further, with *reference* to the charges of falsehood, fraud, and wilful imposition, the statements of the false representations and pretences are not sufficiently specific and do not afford a reasonable ground for saying that the goods were obtained by means of them. They are at most mere matters of degree, and the indictment does not say what was the truth. It is not said what the panel's sales averaged, or that he had no orders for goods, or had made no sales, nor is it said which of the entries were false. There is a wide difference between the case of a man who is alleged to be doing no trade, and that of a man carrying on a trade and showing books and alleging a certain turnover in that trade. The in-

dictment leaves us in doubt as to which of these cases is here alleged against us, and there are no materials which can enable the panel to defend himself. If falsehood is alleged, and it is said that persons were deceived, the *ipsissima verba* constituting the falsehood should be set forth. It is not sufficient to say that books 'containing several or one or more false and fictitious entries of sales of goods' were exhibited. Then as regards the charges under the Statute. In the fourth count (see page 52) I object to the words '*on or about*' in the sentence, 'and you having on or about 22d November 1881 presented,' &c. The charge is that the panel made away with part of his property within four months before the presentation of the petition for sequestration. But if the act charged took place on the last day before the petition was presented, I would not know when the four months begun. There is a statutory period within which the crime can be committed, and the prosecutor is bound to take a particular date within that period. In like manner we object to the expression 'you did *on several occasions* between the 22d day of July and the 22d day of November,' &c. Between those dates there are four months and a day included, whereas the offence is limited to four months before the presentment of the petition. The public prosecutor must know those dates. He says the articles were pawned, and pawnbrokers are bound to keep books which disclose the date of every transaction, and he has libelled upwards of seventy pawn tickets among the productions to be used, each of which is dated. He cannot therefore be allowed to shelter himself by the statement that the particular occasion is to the prosecutor unknown. This mode of charging precludes the panel from pleading alibi. Further, counts 4 and 5 do not specify the manner in which the articles are said to have been disposed of. The words of sub-section 4, which are alternative, are simply used. It is said that he 'did pawn, pledge, or dispose of, otherwise than in the ordinary way of trade, the articles,' &c. That is not a sufficiently

1882.

No. 7.  
Wm. Wilson.High Court,  
July 9.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 18,  
sub-sec. (A)  
3, 4, and 5.

1882. specific averment of the contravention. There is not  
 No. 7. here a specific setting forth of an illegal act which the  
 Wm. Wilson. Court can say amounts to the abstract thing. I should  
 High Court, have been informed in what the contravention consists.  
 July 3. The fifth charge is also open to all these objections, with  
 Cont. of this addition that the goods are said to have been  
 'The Debtors (Scotland) Act, 1880,' pawned in Liverpool; and if pawning be the offence,  
 sec. 18, then the offence was committed there, and this Court has  
 sub-secs. (A) no jurisdiction.  
 3, 4, and 5.

The LORD JUSTICE-CLERK.—The Statute is a Scotch Statute creating the offence of a bankrupt disposing of his property otherwise than in the ordinary way of trade on the eve of or shortly after bankruptcy, and it does not matter where the property is disposed of.

J. CAMPBELL SMITH.—Count 6 is also too vague. It is charged that he mutilated his day books 'by tearing off or cutting out certain portions from numerous leaves thereof,' &c., 'and in many places substituting other entries therefor, and also by erasing a large number of entries and substituting other entries in their place.' What were the entries which were substituted? Also the expression 'numerous leaves' is too vague. Which of the leaves were so mutilated? How do the mutilations and alterations made bear upon the interests of the creditors? The erasures may have been corrections, and all that is charged may be capable of explanation if there had been greater specification. Besides, erasures are not mutilations, and the charge is under the 3rd sub-section.

The LORD JUSTICE-CLERK.—He may mutilate by means of erasures.

J. CAMPBELL SMITH.—The destruction of the superficial texture is not, we contend, mutilation. The erasure may have been quite innocent. A true entry may have been substituted for one that was false or erroneous. This is said, too, to have been done with intent to defraud by deceiving Samuel Bradley. The purpose of section 13 is to put down frauds upon the general body of the creditors, and it was not intended to hamper busi-



ness transactions with individuals. The charge does not, therefore, fall within sub-section 3 of section 13, under which it has been brought. Count 7 also does not set forth any falsehood capable of deceiving. It contains only a list of sales taken from the prisoner's day book, which are alleged to be false, with intent to defraud. If what was intended to be charged is that it was the panel's intention, by means of these entries, to convey the idea that these were goods sold, when in point of fact no sales took place, then it ought to have been said that the false entries were made in order to show that a larger business was being done.

1882.  
No. 7.  
Wm. Wilson.  
High Court,  
July 8.  
Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

BRAND, A. D.—It is said distinctly that no sales had taken place.

J. CAMPBELL SMITH, for the panel.—If that is what is meant we say that is not stated, and if it was it would not be the offence in the Statute. Lastly, in count 8, the charge is one of concealment of property, and this is said to have been done with intent 'to defraud' by concealing or endeavouring to conceal the fact that the articles formed part of his estate. The words *or endeavouring to conceal* ought to be deleted.

BRAND, A. D.—The specification of the false representations and pretences used is sufficient, and the charges of theft are relevant. The theft charged is theft by means of the falsehood contained in the representations set forth. These representations are undoubtedly calculated to mislead. There are only two day books libelled. They are the panel's own business books, and are produced. The prosecutor is not bound to specify the particular entries in these books alleged to be false. The books contain a mass of false entries, and they were exhibited to Bradley (who did business with him) with these entries; and by the representations made, and by the exhibition of these day books containing these false entries, the prisoner deceived Bradley. In order to be relevant it is not necessary in an indictment such as this, and where the books libelled contain a mass of false and

1882.

No. 7.

Wm. Wilson.

High Court,  
July 3.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

fictitious entries, that the prosecutor should specify in detail the false entries that are to be proved. In regard to the second objection, it is contended that the alternatives in sub-section 5 are not proper alternatives, but only different modes of committing the offence of disposing of, otherwise than in the ordinary way of trade, property which has been obtained on credit; and I submit that it is not usual in cases where a Statute creates an offence and sets forth such alternatives, to limit the prosecutor to one or more of these, but presumably it was intended by the Statute that he was to have the benefit of all the alternatives, and to be entitled to contend that the offence has been proved when he could show that the proof established any one of the alternatives. The important words in the sub-section are 'otherwise than in the ordinary way of trade.' If I prove such a disposal of the property as is not in the way of trade, whether it be by pawning or by pledging, it is sufficient, and I am not bound to specify one or other of these modes.

The LORD JUSTICE-CLERK.—I believe this is the first indictment under 'The Debtors (Scotland) Act, 1880,' and therefore I am not surprised that these objections have been taken. In regard to the first objection—that the statement of the theft is not relevant, and that the case of *Marr v. Barclay*, to which we were referred, has no application to the facts here libelled—I am of opinion that the indictment is quite relevant. It is alleged that the panel falsified his own books so as to make it appear that he was doing a larger business than he really was, and that he showed his books so falsified to Samuel Bradley, and thereby obtained possession of the goods; and the purpose for which it is said the prisoner falsified his books was to obtain goods on credit—substantially on sale and return. Now, that of course could pass no property, because without a legal contract entered into without fraud—which was not the case here—the property in the goods could not pass to the panel. The



goods therefore remained the property of Bradley, who had been thus cheated out of them, until they were pawned, and thereby stolen. The case of *Brown v. Marr and Barclay and others*, which was quoted, has been misconceived. That was a narrow case; but there the wholesale jewellers who gave the goods to Marr on a contract of sale and return trusted Marr, who made no false allegations, and handed them over to him, and I and the other judges in that case were quite clear that the property in the goods did pass; whereas in the present case the allegation is that Bradley was deceived by fraud, and induced thereby to part with his property; and I am equally clear that the property did not pass to the prisoner. Then in regard to the minor objections that have been taken, these appear to me to amount to little more than verbal criticisms.

In regard to the objection that there is no sufficient allegation made about the false entries—that the indictment does not specify in what particulars the falsification consists—I have thought it more serious, and I am of opinion that it would have been more accurate libelling if the charge had been more clearly expressed; and there is no difficulty about it. It would have been quite sufficient to have said that the extent of his business fell far short of the representations made of it. But looking to the fact that the books are produced, and that they are those of the prisoner himself, who ought to know all about them, I am not inclined to throw out this indictment on that account. The remaining objection is a matter of very considerable interest. The question raised is whether, under the 4th sub-section of section 13 of the Statute, it is a sufficient libelling of the statutory offence simply to use the statutory words,—whether the libel as it stands is an effective libelling of the offence—in other words, whether under this indictment, if the prosecutor was not prepared to prove either pawning or pledging of the goods, he could prove any other mode of disposing of the property, not in the ordinary course of business,

1882.

No. 17.

Wm. Wilson.

High Court,  
July 3.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-sec. (A)  
3, 4, and 5.

1882. of which no notice whatever was given in the indictment?

No. 7.

Wm. Wilson.

High Court,  
July 3.

Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

I have a great deal of difficulty in arriving at a conclusion upon that matter, and I am not prepared at the present moment to decide the question, and should like the Advocate Depute to consider whether, by limiting the charge to pledging or pawning, he could not get relieved of the difficulty. I think he would do well to avoid pressing the Court to deliver a judgment upon the point.

LORD CRAIGHILL.—There are several offences set forth against the prisoner in this indictment. The first is theft, the second falsehood, fraud, and wilful imposition, and the remainder is a series of alleged contraventions of 'The Debtors' (Scotland) Act, 1880.' To the relevancy of all exception has been taken on the part of the prisoner, and the question now to be determined is whether the objections stated, or any of these, ought to be sustained. With reference to the objections to the first and second charges libelled, I concur with your Lordship in thinking that these ought to be repelled. It may be that goods sent on sale and return, or on sale and approbation, become in a certain sense and in certain circumstances the property of the dealer to whom they are sent, and the decision in *Brown v. Marr, Barclay, &c.*, Jan. 8, 1880, 7 Ret., p. 427, countenances, or it may be is an authority for this opinion. But civil rights were the only matters there presented for determination ; and be that as it may, my opinion is that where goods have been obtained in circumstances such as those set forth in this indictment, the delivery of these goods will not pass the property. The opposite would seem to me to be almost a contradiction in terms, because it involves this proposition that goods obtained by falsehood, fraud, and wilful imposition, which is itself a substantive offence, become upon delivery the property of the person to whom they are sent, and exclude the possibility of his commission of the crime of theft. I am not prepared to adopt this conclusion. The opposite is, I think, the true result, and consequently

I am for repelling the objection to relevancy which has been presented on the assumption that the contrary doctrine is a rule in the law of Scotland. As regards the objection to the relevancy of the charge of falsehood, fraud, and wilful imposition, I have little to add to what has been stated by your Lordship. There seems to me to be sufficient specification, and if all that is said is true, there can in my opinion be no doubt that the offence known by this name has been committed. In so far as the alleged contraventions of The 'Debtors (Scotland) Act, 1880,' is concerned, it appears to me that upon most of the objections it is unnecessary to dwell. All except one were but verbal criticisms upon the expression of the indictment, and contained nothing in respect of which any doubt was created in my mind upon the relevancy of the charges as libelled; but the case is different with respect to that to which I have now to advert. The fourth of the charges is set forth as follows in the indictment (*Reads*. See page 52). Thus the only allegation of contravention in addition to the specification of time and place, is that the prisoner 'did pawn the articles,' &c. (*Reads* to the end of the count." Page 53). Now this is nothing more than a repetition of the words of the Statute. What is meant by pawning, pledging, or disposing of otherwise than in the ordinary way of trade has not been defined, and there being presumably a distinction betwixt pawning and disposing of otherwise than in the ordinary course of trade has not been defined, the accused is left in ignorance of the import of the charge, that is to say whether it means pledging or pawning or disposing of it; and more than that, whichever of these, or whether more than one of these is the point of delict there is no specification of particulars as to the way in which the contravention was accomplished. It therefore appears to me at this moment to be doubtful whether this could be sustained as a relevant charge; and should it be necessary to come to a determination, I should

1882.

No. 7.  
Wm. Wilson.High Court,  
July 3.Cont. of  
'The  
Debtors  
(Scotland)  
Act, 1880,'  
sec. 13,  
sub-secs. (A)  
3, 4, and 5.

1882.  
 No. 7.  
 Wm. Wilson.  
 High Court,  
 July 3.  
 Cont. of  
 'The  
 Debtors  
 (Scotland)  
 Act, 1880,  
 sec. 13,  
 sub-secs. (A)  
 3, 4, and 5.

require time to make up my mind on the subject. But I agree with your Lordship in thinking that if there is any case against the prisoner upon any alternative, the prosecutor cannot be in difficulty in the selection of that which, according to his information, is the true alternative; and this being so, he may well consider whether such a change may not be made upon the indictment without interfering with his freedom or with the course of justice by which the necessity for a judgment will be superseded. More need not be said, and at any rate I am not prepared to say more on the present occasion.

BRAND, A.D.—I move your Lordships that I be allowed to amend the libel by striking out the words '*pledge or dispose of*' in the fourth count so as to make the charge run that he the panel did '*pawn otherwise than in the ordinary course of trade*' the articles specified.

The Court allowed the words to be struck out, whereupon the following Interlocutor was pronounced:—

*Edinburgh, 3rd July 1882.*—The Lords having heard counsel on the foregoing objections to the relevancy, Repel the objections to the charge of theft, and in reference to the other objections the Advocate Depute having deleted the words '*pledge or dispose of*' occurring on the ninth and twenty-second lines of page seven of the indictment, and the corresponding words in the schedules, the Lords find the libel relevant.'

The panel thereupon pleaded not guilty, and the diet was continued till 24th July, when the plea having been renewed the Case went to trial, and the following verdict was returned:—'The jury unanimously find the panel guilty of theft as libelled under the first three charges of the indictment, and unanimously guilty as libelled of all the remaining charges except the eighth charge, which they find not proven.'

Sentence, eighteen kalendar months' imprisonment.

Present,

LORD CRAIGHILL.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. (Asher), Mackay, A.D.*

AGAINST

CHARLES SOUTAR—*Dean of Faculty (Macdonald), Mackenzie, and Hay.*

CRIMEN VIOLATI SEPULCHRI—CONCEALMENT OF DEAD BODY—ATTEMPT TO EXTORT REWARD.—Circumstances in which a person was convicted of ‘violating the sepulchres of the dead, and raising and carrying away dead bodies out of their graves,’ by abstracting a body from the vault of a mortuary chapel, and concealing it in the hope of extorting money, and sentence of five years’ penal servitude was pronounced.

CHARLES SOUTAR, from the prison of Aberdeen, was indicted and accused of the crime of violating the sepulchres of the dead, and the raising and carrying away dead bodies out of their graves :

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court,  
Oct. 23 & 24.

---

 Violating  
Sepulchre.

IN SO FAR AS, the Right Honourable Alexander William Crawford, 25th Earl of Crawford and 8th Earl of Balcarres, having died at Florence on or about the 13th day of December 1880, and his body having been, on or about the 29th day of December 1880, interred in the vault or burying-place of the family of Crawford and Balcarres at or near Dunecht, situated under the mortuary chapel there, part of the building known as Dunecht House, in the parish of Echt, and county of Aberdeen, you did, by yourself, or acting in concert with some person or persons to the prosecutor unknown, on an occasion or occasions between the 1st day of April and the 8th day of September, both in the year 1881, the time more particularly being to the prosecutor unknown, wickedly and feloniously, break into and enter the said vault or burying-place, by removing one or more of the slabs covering and enclosing the staircase or entrance thereto, and did, then and there, by yourself, or acting in concert as aforesaid, wickedly and feloniously, raise or forcibly remove from the coffins enclosing the same, and take out of the said vault or burying-place the dead body of the said Alexander William Crawford, Earl of Crawford and Balcarres, and did carry away the same: And you having been apprehended, &c.

No objection having been taken to the relevancy, the libel was found relevant, and on being called on to plead the panel pleaded not guilty.

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

The following evidence was thereupon adduced for the prosecution :—

ALEXANDER CRUICKSHANK, *Inspector of works at Aberdeen*, deponed—I am acquainted with Dunecht House, the property of the Earl of Crawford and Balcarres. I made the four different plans produced of the mortuary chapel at Dunecht with the vault underneath, plan No. 6 being the interior and entrance, plan No. 7 a section of the entrance looking east, plan No. 8 the north elevation of the chapel, plan No. 9 plan of the grounds, house, and chapel.

JOHN WRIGHT, *House Steward to the Duke of Westminster*, deponed—I was formerly Butler to the late Earl of Crawford. On 13th December 1880 I received a Florence telegram from the Countess of Crawford announcing the Earl's death, and instructing me to proceed at once and bring home the body to this country. I did so. I arrived at Florence on the 16th of December. The body had been put in the coffin before I arrived—in the lead shell, and the shell was placed in an outer wooden case. There was a funeral service the following day at the Villa Palmyra, at which the members of the family were present. The coffin with the body was entrusted to my care on 18th December, with a certificate in Italian, French, and English, signed by the Italian, French, and English consuls that the coffin contained nothing but the Earl's body. These I destroyed, thinking them of no use. Up to the time the body was removed to the railway station at Florence, it remained in the shell in the mortuary chapel at the Villa Palmyra. The outer wooden case was closed the morning I left. I arrived at Dunecht with the coffin and body in the same condition in which these left Florence, except that the outer wooden shell had to be removed at Aberdeen on the 24th of December to admit of the coffin being put into the hearse. The leaden or inner shell was not interfered with at all. The body was placed in the chapel at Dunecht, and the inner shell was then placed in an outer coffin prepared by Mr Allan, Undertaker in Aberdeen. The funeral took place there on the 29th of December. I was present. The body was placed in the family vault below the chapel.

WILLIAM YEATES, *advocate, Aberdeen*, deponed—I have been for the last fourteen or fifteen years Commissioner for the late Earl of Crawford, and I remain Agent for the family. I was present at the funeral at Dunecht on 29th December 1880, and saw the body placed in the family vault at the further end from the entrance and in the second recess from the floor. On 8th September 1881 I received an anonymous letter signed '*Nabob*,' and bearing the Aberdeen postmark of that date. [Shown and identifies letter.] *Reads*—'Sir,—The remains of the late Earl of Crawford are not beneath the chapel at Dunecht as you believe, but were removed hence last spring, and the smell of decayed flowers ascending from the vault since that time will on investigation be found to proceed from another cause than the



flowers.' (Signed) 'NABOB.' In consequence of receiving that letter, I saw the mason who had constructed the vault either that or the following day, and from what he told me I formed the opinion that the letter was intended to give annoyance, and I laid it aside as of no importance. I did not communicate it to the family. Upon 1st December 1881 I received a communication from Mowatt, the Overseer, telling me that the vault was found open that morning, and in consequence I communicated with the police, and went out with Inspector Cran, and the Dunecht Constable was there. We found the slab which rested on and covered the descending stair by which the vault was entered raised about 18 inches. The vault is entered by the descending stairs, which are covered or roofed over by pavement slabs. It was the outer one of these slabs that was raised. It was about 6 feet by 4 feet in size. [Shown plan No. 7.] That shows the state it was in. I had it raised further, and went into the vault with Inspector Cran. I found the open coffin lying in the centre of the vault drawn out of the recess, and the body gone. The lid of the outer wooden coffin had been unscrewed, and was lying beside it. The inner wooden coffin had also been removed, and the leaden shell had been torn open. Everything was left—the inner wooden case or shell in one place, and the outer coffin beside it. The inner shell had been taken out of the lead covering and the outer wooden coffin. I was aware of the efforts made to discover what had become of the Earl's body. I went to Dunecht on hearing that the body was found on 18th July 1881. I went to the place in the wood where it was said to be. It was still in the ground, about 400 or 500 yards from the mansion-house, close by a sand or gravel pit. The earth was removed, and the body was found wrapped in a blanket. The Depute Fiscal, the Keeper, and the Gardener were all there at the time, besides myself. It required a spade to remove the earth from over the body. The gravel was removed with the hands. We then saw a blanket the whole length of the body, on removing which we saw a human body. It was taken to the chapel in the house. I was able to recognise it as the body of Lord Crawford. The prisoner had been employed during about five or six years at Dunecht as a ratcatcher, but that employment had ceased three or four years before this event in 1880. That was because he was so much of a poacher that he was rather a dangerous man to have about the place.

GEORGE CRAN, *Inspector in the Aberdeen County Constabulary*.—I received instructions on 1st December 1881 from the Chief Constable (Major Ross) to go to Dunecht. I went along with Mr Yeates, Lord Crawford's Commissioner, and Robb, a Constable. We went at once to the vault. I saw that there were three or four slabs covering the only entrance to the vault, and that one of these had been raised from 15 to 18 inches. There were three iron bars—what appeared to be old window stanchions—in the neighbourhood. [Shown No. 30],

1882.

---

 No. 8.  
Charles  
Soutar.
 

---

 High Court,  
Oct. 23 & 24.
 

---

 Violating  
Sepulchre.



1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

like these, and two planks on the stairs leading to the vault. I have seen these here. Outside I saw two shovels and a shoulder pick (Nos. 37 and 38). I have seen them to-day. They were within the railings, where the earth was. The vault was underneath the chapel, and the railing was round the place where the stair, which formed the entrance to it, was. I saw that the slab was supported by a round block of wood on one side, and by a shorter piece standing on end on the other side. The vault is approached by a stair of eight steps, 6 inches each, and is about 21 feet long by 11 feet wide. It is supported by a central pillar with arches reaching to either side. You enter opposite the central pillar, and have on either side of you, on the west and on the east, niches for the burial of persons in them. Although the chapel and vault had been built for some time, no one had been buried in the vault except the late Lord Crawford. When we entered the vault on the 1st of December, I saw that the coffin had been removed from the niche. The inner shell lay parallel to the south wall of the vault; the outer shell lay along the west side in front of the niches. The lead was between the inner shell and the south wall. By the inner and outer shells I mean the wooden shells. The lead lay partly below the inner wooden shell and partly on the floor, and mostly covered with sawdust. The lid of the inner shell rested against the niches at the west side of the vault, and stood on end. The screws by which the lid of the outer shell had been fastened appeared to have been unscrewed with a driver. We found nine screws that had been taken out. Four were still left in it, and one was broken. The lid appeared to have been forced up after some had been withdrawn. I also saw a box or screen (No. 9) there, which filled up the entrance to the niche. The inner wooden shell was filled partly with sawdust. There was a pillow at the end, and I noticed the impression of the head upon it. I noticed when I entered the vault a plank (No. 21) upon which the inner wooden shell was resting. It was about 8 feet long. I thought that it had been used as a lever or a slide for taking the coffin from the niche. There was a good deal of sawdust lying on the floor. After it was turned over I noticed another—a shorter plank, about 2 feet 3 inches long. It looked as if it might have been used for the same purpose. The longer plank appeared to have formed part of a scaffolding at one time. I also saw some wreaths that had been placed upon the coffin lying in one of the niches, and have seen them here to-day. There were footprints—I think two—in the sawdust, but so indistinct that it would have been impossible to have measured them or done anything; the outline was too faint. Two days afterwards I noticed that the heap of sawdust on the floor was mildewed. There was the same kind of sawdust inside of the inner shell, and it was mildewed also, but more distinctly. From that I inferred that it was a considerable time since the outrage had been committed. The lead was partly

under the inner wooden shell and part was under the sawdust. When the inner wooden shell was removed it appeared to me that the lead had formed a covering of sheet-lead for the inner wooden shell, and had been taken off at random with a sharp instrument. It appeared to have been cut in order to be stripped off the inner shell. It was just a covering for the inner shell. That was what I understood when they spoke of a lead coffin. I noticed that the lead in all the parts which had been cut was oxidised, and I inferred from that also that the outrage had been committed a good while ago. The coffin handles, plates, and mountings had not been touched. I was sensible of a peculiar aromatic sort of smell coming both from the sawdust on the floor and in the inner shell. I found also a quantity of powder (No. 26) on the floor, of a burnished colour, which also had a similar aromatic odour. The plan No. 7 shows the state in which the entrance to the vault was when we first arrived.

MICHAEL FRASER, *Gamekeeper*.—I knew the late Lord Crawford well. I had been six years in his employment. I became aware in December 1881 that the vault had been opened, and that Lord Crawford's body had been removed. I was engaged along with others in the first unsuccessful search in the woods for the body. It was first begun in December 1881, and continued for about a fortnight. It was resumed in July last, and I was in the searching party with Sergeant Brandie of the police force. We searched up the course of an old ditch with an iron probe (No. 52). We had not had this with us in the first search. As the probe rebounded at a particular spot, on Tuesday, 18th July, I made a hole with the probe and my hands, and found a little wool. I then called the others about me, and a man with a spade, and dug up the earth, and we then found a blanket round what I considered to be a human body. It was lying at the bottom of an old ditch or trench. I accordingly called the Gardener and Sergeant Brandie to me, and Inspector Cran reported the case to Aberdeen, leaving some of his men in charge meantime. We did not take sufficient earth off at that time to enable us to recognise the features. The body was afterwards removed to the house, and placed in the chapel that afternoon. I had no difficulty in recognising it to be Lord Crawford's body. At the place where it was found there was nothing to indicate the presence of the body but the rebounding of the probe. That place had been searched the first time, but not, to my knowledge, probed. The earth was as firm over the body as in any other part of the ditch; and I inferred from this that the body had been there for some time. There were several folds in the blanket over the face. The ground did not show any signs that it had been disturbed since the body was first placed there, or that the body had been uncovered at one point and not at another after being placed there. I observed no earth between the folds of the blanket; it was quite clean. There was 11 or 13 inches of

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court,  
Oct. 23 & 24.

---

 Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

earth over the body. The earth was not higher above the body than it was around it. It appeared to have settled down with equal firmness along the whole line of the body. The upper part of the soil was black mould, and the under part gravelly. There was seldom water running in the ditch. The wood was pretty thick there. There had been wood thinned there in December 1881 and in the following spring, or before and after the first search. A peculiar odour in the neighbourhood of the vault was first spoken about at Dunecht about the end of May 1881 or about the 1st of June. There was a strong smell about the vault at that time.

JAMES FRASER SMITH, *Gardener, Dunecht*, deponed—I prepared several of the wreaths put on the coffin, and, besides those, members of the family sent others. There were a great many in all. I first perceived a smell coming from the vault on Monday, the 30th of May 1881. It was a sweet aromatic sort of smell. I was in the habit of passing the vault daily, and I had never felt it before. I thought it had been caused by the *arbor vitæ* used as a background to the flowers of the wreaths, and that it had proceeded through the ventilator. I expressed that opinion to others at the time. The general opinion was that it was caused by the *arbor vitæ*. Two or three days after this, on the 2nd or 3rd of June 1881, immediately after the builder had cemented the stones, I sowed the ground around the vault, and the earth that had been put on the top of the flags, with grass. At the same time I put up a railing round the vault. On 1st December of the same year I remember being told that the stone had been removed, and on examination I found that one of the slabs had been prised up. I was one of the searching party in July last—when the body was found. I was present when the ground was opened up, and the body was found. The soil was a mixture of sand and earth mixed, and was finer. The spot was near a gravel pit. There is a walk leads from the house close to the pit. Part of the root of a tree had been cut in opening the ground by the searcher—but I saw that there was another part of the root that had been cut previously, when the hole was originally made. The cutting last referred to looked old, and as if it had been done before the fall of the previous season—before Nov. 1881. The end of the root had grown into the trench a little. We cut a little more off it in order to get the body removed. The end was black, and the rosin dripping out. From that, I formed the opinion that it had been cut some time ago, because the sap of the tree falls back into the roots when the leaves fall in the autumn. The body did not look, I thought, as if it had been moved after being first put into the hole. The blanket did not appear to have been moved. The winter after the funeral, 1880-81, was a very severe one. The snow remained long on the ground—from December until the beginning of April, and longer in

some parts. There was snow on the ground at the time of the funeral, and for sixteen weeks after. It lay about the vault for a very long time.

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

JOHN MOWAT, *Overseer at Dunecht*, deponed—I first smelt the odour at the vault on the 1st of June 1881. I paid some wages at the house on that date, and heard the conversation about the smell at that date. I was told that day that there was some work being done at the vault by the gardener and mason. On the 1st of December 1881, one William Hatten, a labourer, came to me and told me something that led me to go to the vault. In going there, about 7.45 or 8 A.M., I saw that one of the slabs had been raised upon one side. The opening, I thought, was not sufficient to admit of one or more persons going into the vault and taking out a body. I at once took steps for communicating with the police at Aberdeen. The slab was raised up in such a manner as would have attracted the attention of a passer. The opening was not sufficient to admit of a person entering. The slab would require to have been displaced further for that. The displacing of one slab would have been sufficient. When I saw it first it was only raised fifteen inches. I saw afterwards what had taken place inside the vault, and I thought that it would at least have taken two men to raise the slab, take the coffin out of the niche, raise the lid, and remove the body. Two men, I think, might do it all within three hours.

FRANCIS CHRISTIE, *Builder, Roslin Cottage, parish of Cluny, Aberdeenshire*, deponed—I built the vault and mortuary chapel at Dunecht. The work was commenced about eleven or twelve years ago. I think in 1871. The vault was completed about a year afterwards, but the entrance was not completed until later—about four or five years ago. The entrance consisted of a descending stair, with a wall on each side and four flagstones, and those flagstones had been on the top of the stair covering the entrance for some years. In June 1881 I put lime and cement round and over the flags, for the purpose of preserving the lime. After the body was placed there in December 1880, the flagstones were replaced, and were then cemented, but with lime only. When I cemented them again in June 1881, I did not notice particularly that any of the lime had been displaced. I did not observe any crevice between the stones, or anything peculiar at that time. We put the cement over the lime in the joints to keep the water from penetrating. The place had not been finished up in consequence of the snow, and I just finished it up before it was covered with earth. I heard at that time that there had been a smell coming from the vault, and I afterwards perceived the smell myself coming through the slabs. There were also ventilators coming from the bottom of the vault. I understood that the smell was first felt on the 29th of May 1881.

ALEXANDER CHALMERS, *Mason, Corskie, Cluny*, deponed—I observed a peculiar smell proceeding from the vault on the 30th of May of last

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

year. It smelt something like spirits of wine. On looking at the vault I noticed a crevice between two of the outside flags. The crevice had got there in the interval between the replacing of the flags after the funeral and 30th May—the date I am speaking of. I attributed the crevice to the action of the frost. The crevice was afterwards filled up with lime, and cemented on the top to preserve the lime, and to prevent the smell getting out. There was a good deal of work going on about Dunecht during 1881, and a person going there would have had easy access to the tools of the workmen at any time—shovels and picks, and tools of that sort. On 1st December last I was present when the outer stone at the entrance was found displaced. I saw there the picks and shovels and an iron bar now produced, which appeared to have been used in lifting the stone. These belonged to workmen, and had been left in an adjacent lime-shed on the previous night. The tools lay in the shed, which was open nightly throughout the year. After the funeral in December 1880 the vault was cleared, and no sawdust was left lying about. I was one of the last to leave the vault.

*By the COURT.*—The crevices in the flags were filled up with lime after the funeral. I did not observe any other crevices than the one I have spoken to, out of which the lime had come. In June 1881 I did not think anything about the stone having been lifted. It did not occur to me. If the flag had been lifted, there was no other crevice that would have opened up. If the stone had been lifted, that would have produced such a crevice. The end of the niche in the vault was closed up with a board, which was removeable. There was no work requiring to be done in the vault after the body had been put in the niche except the closing up of the niche.

ELIZABETH MATHESON, *housekeeper, Dunecht*, deponed—I have been housekeeper at Dunecht for five years. I remained in charge at Dunecht after the family left in 1880. On Sunday, the 29th May 1881, while passing the entrance to the vault on my way home from church I felt a smell. I felt it first just before coming to the entrance to the vault opposite to the chapel door, and I continued to feel it while I went on passing the vault. It was a pleasant smell. I had not observed it previously. I cannot remember if I had passed there during the previous week. On the Monday following I heard that others had observed the odour; one of the maidservants called my attention to it, and some men who were working there, I heard, had felt it.

JAMES COLLIER, *formerly Saw Miller at Dunecht, and now a Tramway Conductor, residing in West Graham Street, Glasgow*, deponed—I went to Glasgow on the 7th July last. During the whole of the previous thirty years I had been a timber merchant at Echt, with the exception of four years when I was in America. I knew the prisoner by sight, but I was not on speaking terms with him. On

the last Friday of May 1881, the 27th of the month, I travelled from Aberdeen to Echt by the Cluny coach which passes the Broadstrake Inn. It was timed to leave Aberdeen at four and to arrive at Waterton of Echt, twelve miles distant, at six o'clock. That is not the terminus of the coach. It goes five miles further. Waterton of Echt is the hamlet at Echt, and is about a mile from Dunecht House. The inn kept by Mrs Leith is at that place. That is about seven and a half miles from Aberdeen. The coach stops at the inn. On that Friday the coach was crowded, and there was a brake running in addition to the ordinary 'bus. In the course of the journey I, being in the brake, saw the prisoner (whom I had previously seen in Aberdeen) on the coach. I saw him first that day in Aberdeen. I was waiting for the tramway, and found myself accidentally standing beside him. He excited my curiosity from the fact of his being newly out of prison for another offence. I took a particular view of the man, and went about my business and did not see him again until I was at the Broadstrake Inn. Both vehicles stopped there. I was on the brake, and the 'bus started first from the inn, and just as it was starting I saw Soutar jump on to the 'bus. Whether he had travelled from Aberdeen to Broadstrake by the coach I cannot tell. The prisoner attracted my attention as he had done in Aberdeen, and I spoke to Alexander Coutts, farmer, Bervie, in the parish of Skene, about him. I was surprised to see him, as I did not think that his term of imprisonment for a certain offence had expired. On leaving the brake at Craigiederg, half a mile from Dunecht, I saw the prisoner still on the 'bus.

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court,  
Oct. 23 & 24.

---

 Violating  
Sepulchre.

ALEXANDER BRENNER COUTTS, *Farmer and Wood Merchant, Bervie, Skene*, examined by Mr MACKAY, deponed—I recollect of Collier calling my attention to the prisoner at Broadstrake, on a Friday in the end of May of last year. The prisoner had been employed by me as a ratcatcher thirteen years before, but I had not seen him for some time. On the 'bus reaching Mrs Leith's inn, at Waterton of Echt, I got off, and I saw the prisoner also getting off there. The vehicle went on to Cluny, five miles further, but I cannot say whether the prisoner went farther with it or not. This happened on a Friday towards the end of May.

JEAN RENNIE or LEITH, *Innkeeper*.—I keep the inn at Waterton of Echt. I know the prisoner. He lodged occasionally at my house, although he had not done so for five years. He sometimes lodged with me a week or two. During the time he lodged with me he was catching rats at Dunecht. The prisoner came to my house in the end of May last year travelling by the Cluny coach. It arrives at my house about six o'clock P.M. Leaving the inn it goes by the Alford turnpike road to Cluny about five miles further. I saw the 'bus leave my house. Soutar did not leave with it. He walked up the road about the time the 'bus left—along the same way



1882.

No. 8.  
Charles'  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

as the 'bus for a short distance, and then struck off south at a place called Shoemaker's Brae, which leads from the Alford turnpike road towards the village of Echt. My house is in the hamlet called Waterton of Echt. Waterton of Echt is two miles from the village of Echt. My house is three miles by the road from the village of Echt, and Dunecht House and policies lie between Waterton of Echt and the village of Echt. Dunecht House lies nearly between the two. The prisoner, who was alone, had some refreshment in my house. I did not hear the prisoner say anything to anyone on the 'bus about waiting for him at the Free Church. The prisoner was not seen by me again that night. During that year my servants changed a good deal. One, Margaret Murison, left on the 26th of May, and another, Rachel Forbes, who is now dead, came on the 4th of June and remained seven weeks, while a third, Jane Copland, came on the 21st or 22d of August. I was thus about a month without a servant. I did not myself see the prisoner again that season. One of my daughters, Mrs Leggatt, was with me for a time in the summer; she remained with me from the 20th of June till the end of August.

BARBARA RENNIE, *Sister of last witness*, deponed.—I was staying with my sister at Waterton of Echt at the end of May last year. I know the prisoner by sight and saw him there then. He came by the coach from Aberdeen, and had some refreshment. I think it would be about the 26th of May. At all events it was towards the end of May; I don't remember the date. When he left he was walking. I saw him for a quarter of a mile going up the Shoemaker's Brae. I did not see him again that night.

ISABELLA LEITH or LEGGAT, *wife of James Leggatt, Joiner, Albion Street, Aberdeen*, deponed—I am a daughter of Mrs Leith, innkeeper at Waterton of Echt, and I am in the habit of spending a part of every summer there. Last year I went there on the 25th of June, and remained for two months. The prisoner called at the inn while I was there. It would be in July or August that he called, but I cannot remember the exact date. My mother was not in the inn at the time. He came with the coach from Aberdeen, arriving at six o'clock, and having partaken of some refreshment, he went away. He did not go farther with the coach; he went straight up the Shoemaker's Brae. My mother had no servant at that time.

JAMES COWE, *Plasterer, Charles Street, Aberdeen*, deponed—I was working at Dunecht House in the spring of 1881, and while I was so engaged I lodged at Mrs Leith's inn. I did not see the prisoner there. I had known him for some time. I had known him for three or four years, perhaps. I was in the habit of meeting him occasionally in Aberdeen. The prisoner was a friend of an uncle of mine, and that was the way I got to know him. During the time I was employed at Dunecht I did not see him there. In the course of that period I was occasionally, but very seldom, in Aberdeen, and I saw him



sometimes. I remember the time of the Cattle Show in Aberdeen—about the 26th or the 27th of July 1881. Q. Did you see Soutar at all at that time? A. No. Q. Then if he says you did that is not true? A. No. Q. On any of the times you saw him in Aberdeen did you speak to him about the removal of Lord Crawford's body? A. No, not that I remember. Q. Did you at all? A. I don't remember of doing it. Q. Did you ever speak to him about a peculiar smell being felt at the the vault? A. Not that I am aware of. Q. Did you ever say to him that there was a smell very like decaying flowers? A. No. Q. Or wine? A. No. Q. Or benzoline? A. No; that's a word I never mentioned to him in my life.

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

WILLIAM SMITH LAWRIE, *lately Farmer at Myrewell, Echt*, deponed—I saw the prisoner at Livingstone's inn, at the village of Echt, in the month of September of last year. Livingstone's inn is in the village of Echt, not in Waterton of Echt. A 'bus ran from Aberdeen to the village of Echt, as well as to the Waterton of Echt. The road to Echt and to Waterton is the same for a certain distance, and divides at the sixth mile-stone. I purchased two stones that day, and a cheese from Coutts or Burnett, merchants at Echt. I also got a rake mended that day by Symon, the blacksmith, at Echt. It is my opinion that the prisoner had travelled by 'bus to the village. I am able to fix the date from these purchases made at the time. The prisoner was introduced to me by Mr Farquhar, the old gardener at Dunecht, and at the suggestion of one or other of them, we went together into the inn, where we had some drink. I rather think it was Soutar or Farquhar, one or other of them, that wanted me to go into the inn. Q. When you were sitting in the inn together, did the prisoner say anything to you which struck you as odd? A. Yes; he asked me if any person had disappeared mysteriously about Echt, and I said no, that I was too well acquainted with Echt for any person to disappear there without it being known to me. Q. What did he say to that? A. He said, 'Ay, but there was.' The prisoner meant to say that there had been a murder committed, or something of that kind. He used words something to that effect.

*By the COURT.*—That was what I took it to be.

*Examination continued.*—Q. Did he tell you how he came to know of it? A. Yes; he said he happened to be on the estate of Dunecht one night, and that he came across some men with a body. The men, he stated, were putting the body which he saw out of sight. From what he said, the impression I formed was that he was telling us of a murder and of the putting away of the body of the murdered man. At that time (September 1881) I had not heard anything about the interference with the Dunecht vault. There was not a sound of anything of that kind then. Q. Did you think that Soutar was serious or the reverse when he told you all this? A. I thought he was telling me a parcel of lies; that's what I thought. In these circumstances, I did not pay very much

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchra.

attention to what the prisoner told me. Q. Did he tell you whether he had seen any part of the body? A. Yes, he said he had touched the hand. Q. From what he said, had you any idea who he wished you to think had been murdered? A. I could not believe, you know, that there was such a thing.

*By the COURT.*—The prisoner seemed to me to wish to ascertain whether anyone had heard that anyone had disappeared.

*Examination continued.*—On being told that this was not the case, he asserted that such a thing as he mentioned had occurred. It was not stated exactly where this happened, but it was somewhere in the woods or on the Echt estate. There was a servant in the inn at the time we were there, and I rather think she was going about when the prisoner made this statement.

ELIZABETH MITCHELL, *Domestic Servant*, deponed—I was a servant at Echt inn for twelve months prior to Martinmas last, and I am now at the Manse at Midmar. I recollect the meeting at the inn between the prisoner, Lawrie, and Parker. It was between seven and eight o'clock, about the end of August. During the time they sat over their drink they were muttering about a body. I did not hear all that passed, but the prisoner said it was in a wood, and that he had come upon five men burying it in the woods, about twenty minutes' travel from that place. I did not hear anything said as to what wood it was. I mentioned the matter to Mrs Livingstone then, and was advised to say nothing about it. There was no mention about anything having been done to the vault at Dunecht House up to that time.

WILLIAM SYMON, *Blacksmith at the village of Echt*, deponed—to being in the village inn along with witness, William Smith Lawrie, and the prisoner, on 20th September 1881. Lawrie had given me a rake to repair that day, and by referring to my books I find that it was the 20th. He had a cheese with him. That was the same day I saw Lawrie and Soutar together.

JOHN PHILIP deponed—I am at present a shoemaker at Yeats Lane, Aberdeen. In the end of February last I was apprehended on the charge of stealing the body, and was liberated on 4th March last. Shortly after my liberation I met the prisoner Soutar in Aberdeen. I did not know the prisoner previously; I only knew him by reputation. He was standing with a marine store dealer, and he came up and accosted me, 'Philip, is this you?' and asked about my having been taken up on suspicion. Prisoner introduced himself. He said, 'You must know me, I am Soutar, the ratcatcher, who was at Dunecht while you were drill instructor there.' I replied, 'I remember distinctly a gentleman of your profession having been employed at the policies, although I never saw you,' and I added that I believed he was the party who should have been where I had come from—meaning the prison. He then proposed that we should adjourn to a public

house, and we had some refreshments. We had some conversation, and it seemed to me that the prisoner's object in wishing the conversation was to know what I had said in my judicial examination before the Sheriff, and whether I had said anything about him (the prisoner). He seemed very anxious to know. He asked me what had passed. In answer to his questions I told him that in my judicial examination I had been obliged, from information I had obtained, to say to the Sheriff that he (Soutar) was the perpetrator of the outrage.

1882.

---

 No. 8.  
 Charles  
 Soutar.

---

 High Court,  
 Oct. 23 & 24.

---

 Violating  
 Sepulchra.

{ GEORGE MACHRAY, *Gamekeeper, Portland Street, Aberdeen*, deponed—I know Soutar. I was keeper at one time at Urie, and Soutar came about there catching rats. I have seen him occasionally, and I have spoken to him about the Dunecht outrage. I went to Braemar in March last, and I think before that time the prisoner said to me twice that he could tell where the body was. He did not tell me where it actually was. I had heard about the outrage before that, but I did not feel any anxiety to find out where the body was at that time, and I did not ask the prisoner where it was. I thought nothing about it. I returned from Braemar in the first week in June. On 14th of July I met Soutar, and had some conversation about the outrage. I had seen him in the interval between my return from Braemar and the 14th, but had not had any conversation with him about the affair. On the 14th he invited me to go into Wilson's public house in Carmelite Street. He opened the conversation on the matter by saying if I would go up and tell Dr Cassells that he (Soutar) could tell where the body was, on two conditions—namely, that they would find out the persons who took the body, and give protection to him (Soutar). He asked me to take a message to Cassells to that effect. Cassells was a commission agent. I did not know, and I did not ask the prisoner to give his reason for sending this message to Cassells. Q. Had you no impression as to his reason for telling you to go to Cassells? A. No, I hadn't.

*The SOLICITOR-GENERAL.*—Now come away, Mr Machray; did you know who Cassells was?—I understood that Cassells was the person who was trying to find out who it was that had removed the body, and was making inquiries in Aberdeen on behalf of Lord Crawford's family. Soutar did not tell me to say anything to Cassells about a pardon. I am quite sure of that. I knew at that time that there was a reward offered. I had seen it in the newspapers. There was no allusion to a pardon when I got the message. Just that we were to get the people who got the body. All Soutar said was just that he hoped he would be saved from the parties who took the body.

*By the COURT.*—The word 'pardon' was never used by Soutar in our conversation. I did not see Cassells, but I met the prisoner by appointment the following day—the 15th—at Wilson's public house, when the prisoner again asked me to see Cassells; and I again went

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

to that gentleman, but did not find him. On Sunday, the 16th of July, I and the prisoner met at the Links. That was the third meeting we had had since I returned from Braemar. I wanted to know if it was really correct that he knew where the body was. I was not altogether sure until this Sunday. Our conversation lasted about an hour on the Links. He told me that he would tell where the body was, on the conditions above mentioned. I tried him if he knew who the parties were, and he told me no, that he did not know anything about them. I tried him to tell me the place where the body was, but he refused to tell. I did not find out. He asked me to go up that Sunday night, and tell Cassells that he (Soutar) would tell him where it was. I went, but did not find Cassells. I then gave information to the police, in consequence of which an apprehension was made.

*By the DEAN OF FACULTY.*—The prisoner told me that he had been ‘threatened very hard’ by the men whom he met in the wood.

JOHN ALFRED ALSOP, *solicitor, High Court of Justice, London*, deponed—I was employed by the Crawford family to make investigation into the Dunecht outrage, after it was discovered. [Shown a letter (Label, No. 2).] I received that letter on 23rd December 1881. It came by post to London. *Reads—*

‘THE LATE EARL CRAWFORD.

‘Sir,—The body is still in Aberdeenshire, and I can put you in possession of the same as soon as you bring one or more of the desperados who stole it to justice, so that I may know with whom I have to deal. I have no wish to be assassinated by rusectionests, nor suspected by the public of being an accomplice in such dasterdly work, which I most assuredly would be unless the guilty party are brought to justice. Had Mr Yeats acted on the hint I gave him last Sept., he might have found the remains as though by axedand and hunted up the robbers at lsure, but that chance is lost, so I hope you will find your men and make it safe and prudent for me to find what you want.

‘*P.S.*—Should they find out thad an outsider knows their secret it may be removed to another place.’ (Signed) ‘NABOB.’

WITNESS continuing, deponed—A person of the name of Cassells was employed to make enquiries on the subject. I first caused an advertisement to be inserted in the newspapers in regard to the matter in December 1881. I cannot remember the exact date. Cassells was a person living in Aberdeen, who had volunteered his services. It was known in Aberdeen that he had been so employed. I was frequently in communication with him.

FRANCIS OGSTON, jun., deponed—I am a doctor of medicine in Aberdeen. At the request of the Fiscal at Aberdeen, I went to Dunecht on 18th July, and made two reports on the body after it

had been discovered—one dated 19th, and the other the 22nd, of July. The following is the first:—*Reads*—

‘I hereby certify, on soul and conscience, that on the afternoon of Tuesday, the 18th day of July 1882, I went to Dunecht House, Aberdeenshire, along with Mr Henry Peterkin, Assistant Fiscal of Aberdeenshire, to examine and assist in the removal of a dead body, supposed to be that of the late Earl of Crawford and Balcarres, which had been found in a wood within the policies of Dunecht House, Aberdeenshire.

1882.

No. 8.  
Charles  
Soutar

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

‘That on examining the place, I saw that the upper layer of the earth in which the body was lying had been disturbed, apparently recently, so as to bring into view part of a blanket in which the body was wrapped; but this disturbance of the earth had only extended down to the corpse over the face, and that no other part of it had been exposed, the superficial layers of the earth to the depth of about 10 inches having only been removed, leaving a covering of earth over the trunk and limbs of a thickness varying from 1 inch on the chest to 4 or 5 inches over the limbs (legs), which had a compact appearance, as if it had been undisturbed for some time.

‘That on further exposing the body, the earth at its sides was found to be firmly packed around it, and that several roots of trees which projected into the pit or grave had a rough or jagged appearance, as if they had been divided by a bluntish implement; and that their free ends were dry and crumbling, in some cases, for about an inch or more from the jagged ends, showing that they had been divided some considerable time ago.

‘That the body was lying on its back with the legs straight, the right foot crossed over the left, and that the arms were crossed over the front of the chest, the right hand lying nearer the face.

‘That the corpse was loosely wrapped in a blanket, and clothed in a woollen jacket and drawers and a linen shirt, and the face and head were closely covered by a cotton or linen cloth, through which the form of the head and features were easily discernible.

‘That the wrappings of the body exhaled a sweet resinous odour.

‘That on removing the corpse from the grave it was found to be intact, and that the wrappings, though to a considerable extent decayed and softened, had not been in any way disturbed.

‘That the gravelly soil underneath the body was darkened, and to a noticeable extent, to the depth of an inch, saturated with moisture, and having a distinctly aromatic odour.

‘That on the body being removed to Dunecht House, the wrappings were partially removed, when they were found to be easily tearable, and that the surface of the corpse was soft and moist and in a state of commencing decay, but not exhaling the usual odour of putrefaction.

‘That on removing part of the covering of the face and neck, short

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

hair of a white colour with a faint reddish tint was found on the front of the neck and on the cheek, and that a tuft of similar hair was seen on the summit of the head.

‘That the cloth over the face, head, and neck appeared to be adherent by a layer of blackish substance.

‘That the shape (profile) of the features was sufficiently preserved to admit of identification by Mr Wm. Yeates, advocate, and others.

And that from the appearance of the body, and the trappings, and of the soil surrounding it, I am of opinion that the corpse had been lying there for a considerable time; and that it had been preserved from the usual process of putrefaction by some preservative substance which was in part of a resinous and odorous nature.’

My second report, which is dated the 22d of July, is as follows:—

‘I hereby certify, on soul and conscience, that on Friday, the 21st day of July 1882, I proceeded to Dunecht House by order of Charles Duncan, Esquire, Procurator-Fiscal of Aberdeenshire to remove label and preserve part of the wrappings of the body of the late Earl of Crawford and Balcarres, viz.—(1) The blanket; (2) of the jersey or jacket; (3) of the shirt; and (4) of the drawers. That I attempted to remove part of the cloth covering the face, but found it impossible, on account of the rotten state of the cloth and the tenacity with which it adhered to the face.’

On being examined, witness further added—The body did not show the usual appearances of a putrefying body, and had the appearance of having been embalmed with a substance of a resinous and odorous nature. I formed the opinion also that the body must have been there for a considerable time from the condition of the wrapping and of the soil. I thought that except in so far as the earth had been removed to let the place be seen it had not been disturbed since it was put there. There was a cloth over the face which adhered, but the features were quite recognisable. The cloth formed no impediment to recognition.

JAMES BRANDIE, *Sergeant in the Aberdeenshire Police*, deponed—I went out and took part in the search in July. I was searching when Fraser found the body, and was called by him to the place. It was in a fir wood which appeared to have been recently thinned. The hole in which the body was found was an old ditch, and would have been easily dug; but the mould was pretty firm about the body when we found it. I took possession of pieces of plank, cloth, and of the root of a tree, and a bottle containing mould—Nos. 46 to 50 inclusive, and Nos. 63 and 54. [Shown Nos. 57, 58, and 59.] These are copies of the *Aberdeen Evening Express* of 6th, 9th, and 13th December 1881, and they contain advertisements with reference to the removal of Lord Crawford’s body.

The advertisement in the *Express* of the 6th is—



## ' NOTICE.

1882.

' Removal of the remains of Lord Crawford from the vault  
at Dunecht.

No. 8.  
Charles  
Soutar.

' The Procurator-Fiscal earnestly requests any one who has during this year observed anything at Dunecht or otherwise, which having reference to the removal of the remains of Lord Crawford from the vault there, appears to be suspicious, or to affect the same, to communicate their information to him, or to the Chief Constable of Aberdeen, or to Inspector Cran, presently at Dunkeld, or to any constable.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

' (Signed) CHARLES DUNCAN, P.-F.'

' Procurator-Fiscal's Chambers,

' Aberdeen, 4th December 1881.'

Depones also, The advertisement of the 9th December is as follows:—

## ' NABOB.

' Please communicate at once.'

' *Re* the late Earl of Crawford.

' All communications addressed to Mr J. A. Alsop, at Lord Crawford's, Dunecht House, Aberdeen, will be received by him in strict confidence.'

Depones also, And those in the paper of the 13th are—

' Fifty pounds reward will be paid to the writer of the anonymous letter in September last addressed to a person in King Street, Aberdeen, on his furnishing full particulars.'

Depones further, And then the second advertisement in the *Express* of the 9th commencing 'The Procurator-Fiscal earnestly requests,' &c., is repeated. I know that there was an offer of a £600 reward extensively circulated. (Shown copy, and reads.) This is one of the copies—

' £600 Reward.

' Whereas the body of the late Earl of Crawford and Balcarres has been taken from the vault at Dunecht House, Aberdeenshire, a reward of £100 will be paid by Her Majesty's Government, and a further reward will be paid by Messrs Alsop, Mann & Co., solicitors, 23 Great Marlborough Street, London, to any person, other than a person belonging to a police force in the United Kingdom, who shall first give such information as shall lead to the discovery and conviction of the perpetrators of the offence; and the Home Secretary will advise the grant of Her Majesty's gracious pardon to any accomplice, not being the person who actually committed the offence, who shall first give such information as shall lead to a like result. Information to the Director of Criminal Investigations, Great Scotland Yard, London; Messrs Alsop, Mann & Co., solicitors, 23 Great Marlborough Street, London; or to the Procurator Fiscal, Aberdeen, Scotland.'



1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

Depones, That would appear about the end of December 1881. No. 5 of the productions for the panel is a copy of the *Aberdeen Journal* of 30th December 1881, containing the placard as an advertisement. Hand-bills announcing the reward were posted up in the district. The Cattle Show was held at Aberdeen on 21st and 22nd July 1881.

The SOLICITOR-GENERAL.—With the declarations that is the case for the Crown.

The following declarations were then read :—

‘At Aberdeen, the 17th day of July 1882 years, in presence of John Comrie Thomson, Esq., advocate, Sheriff-Substitute of Aberdeen, Kincardine, and Banff, compeared a prisoner, and the charge against him having been read over and explained to him, and he having been judicially examined thereanent, declares, My name is Charles Soutar. I am aged forty-two. My occupation is a vermin killer. I reside in Schoolhill, Aberdeen. I am not married. Being shown a letter subscribed Nabob (see page 66), declares, It was written by me. Being shown an envelope attached thereto, declares, I think that is the envelope in which the said letter was sent, and I think it is addressed by me. I posted the said letter and envelope to Mr Yeats, 46 King Street, Aberdeen. Being shown another letter, headed “The late Earl Crawford” (see page 78), I wrote that letter, and posted it in the envelope attached thereto to Mr Alsop, solicitor, London. Being shown letter on a single piece of paper subscribed “Nabob,” declares, I wrote that to-day in the county police office at the request of the police.

Being interrogated, What do you know of the removal of the late Earl of Crawford’s body? Declares, I know nothing about it, except that I found it in the wood. I was poaching at the time. I had left Aberdeen that afternoon for Skene on foot. No one was with me. I had no gun. The only poaching engine I had was a net. I had no dog. I went round by the back of Skene House, and at the back of the gamekeeper’s. I was in a wood called the Crow Wood. I went to Waterton of Echt. It was past eleven when I got there. I took a turn there by the road, and came round there by the road, and came home to Aberdeen by the Echt road. I went from Waterton to the village of Echt over wood and other enclosed land on the east side of the road. I did not enter the village of Echt. I went down the north side of the road. I went by the back of Fraser the keeper’s house through the woods. I got out on to the open road about the burn of Garlogie. It was well into morning then.

After I left Waterton of Echt, and in a wood, I saw something. Interrogated, In what wood? Declares, I might as well tell the whole story. The prisoner adds: My life has been threatened if I disclose what I saw, and I should like some protection before telling

the whole story. It was threatened at the time, in the wood, and it has not been threatened since. As I passed through the wood I heard a stick break on my left hand side. I stood still to hearken. I then heard the rustle of another man crawling on my right hand side. I thought it was the keepers trying to surround me, and I ran as fast as I could for the thickest part of the wood. I had gone about 20 yards when I was tripped up by a third party. When I looked up there were two men above me holding me down. They seemed young like chaps, of the middle size. Their faces were black, and I felt they had on wincey shirts. They had neither coats nor caps on. In about half a minute they were joined by other two men, being those I had heard creeping. I was on my back. These were tall men, with coats and hats off. Their faces were masked half-way down, and I saw their white shirt sleeves. One of the tall men pushed a pistol towards my breast, and said to one of the men who had been holding me, "Remove your arm, and I will settle him." One of the men who were holding me down took hold of the wrist of the man with the pistol, and said, "Hold on. There's more of them." The man who said so got off me, and led the man with the pistol to one side, and said to him, "It's all right; it's the ratcatcher; he's poaching." After talking a little in whispers, which I could not make out, they called to the other tall man to come to them, which he did. The three conversed for a short time, but I could not hear what they said. They all came back beside me, and told the man that was holding me to let me up. The tall man who had the pistol examined my net with his fingers, and asked me what I was doing there, and if I was alone. I told him I was looking for a beast, and that I was alone. He said that was well for me, as if I had been a spy on his movements, I would not have seen the light of another day. He added, "Remember what I am going to tell you. You're known to our party, and if you breathe a syllable of what you have seen I will have your life if you're on the face of the earth." I said I had enough to do to look after my own affairs. I was then let go, but on my turning to follow the direction I had been going first, the said man would not allow me to go that way, and told me to go back the way I came. I hunted for an hour or two, and when daylight came in I went back to the part of the wood where I had been seized. I saw nothing of the men, but on looking at the place where I had first heard them, I found a place where they had concealed something. It was a heap of rubbish. I opened it up, and found a blanket, to which I gave a pull. There was the dead body of a man inside it. I, after looking at it, covered it up again. I did not perceive any smell of putrefaction. There was a strong smell of what I thought was benzoline. The smell stuck to my hands for half a day afterwards. My impression at the time was that the man had been murdered, and that an attempt had been made to destroy the body by burning it with some

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

chemical. The eyes were shrunken, but the other features did not seem to be shrunken. I came in to Aberdeen by walking along the turnpike road, having missed a cart in which I expected to get to town in. I decline to say what cart that was, because the driver was only a servant, and his master would visit it on him if he knew that he drove rabbits to town for me. I had heard that the man had gone out that way, and I knew he must come back that way. Interrogated, Is he driver to Napier, dead horse buyer? Declares, That's just it. He is not there now. I do not know how the men left, and I heard no sound of wheels. I think the above happened about the end of April or beginning of May. I brought in some rabbits that morning, but I decline to say to whom I gave them. It was in the year 1881, on the day of the Cattle Show in July, that I was at the Links in company of Cowe, a plasterer, of Dunecht, and another man whom I did not know, but who, I think, had been at one time employed at Dunecht. They were talking about the chapel and house. Cowe mentioned that the vault in which the old Lord had been buried had been closed up, and that this had been done because of a strange sweet-like smell that came from it. In reply to my question what the smell was like, Cowe said it was like decaying flowers, or wine, or benzoline. For the first time it occurred to me that that was the smell I had perceived on the body in the woods; and a few days afterwards I went out again to the wood. I went through the day, and entered the wood by the Loch. I went round about in the wood a bit to keep clear of the keepers. On going to the place where I had seen the body I found that a mark which I had placed had not been removed. I then, without disturbing anything, went to Waterton, then to Old Echt, and saw the old gardener, Mr Farquhar, then to the village of Echt. The two men who tripped me, and had on wincey shirts, spoke with an Aberdeenshire accent, and seemed common men. The men with the white shirt sleeves seemed gentlemen. They spoke like educated men. The taller of them seemed the leader of the party. The pistol was a good large revolver, and all very bright, as if it was plated. Interrogated, Will you take the police to the place where you saw the body, or will you describe the place so that they can find it for themselves? Answers, No; I'll rather wait until you get them that took the body. It will be safer for me then.—Sealed labels are attached to said letters and envelopes, and the same are duly subscribed by me and the said Sheriff-Substitute and the witnesses to this declaration as relative hereto.'

II. 'At Aberdeen, the 23d day of July 1882 years, in presence of John Comrie Thomson, Esq., advocate, Sheriff-Substitute of Aberdeen, Kincardine, and Banff, compeared a prisoner, and the charge against him having been read over and explained to him, and he having been judicially admonished and examined thereanent, declares—My name

is Charles Soutar. I have just now heard read over to me the declaration emitted by me on 17th of July current, and I adhere thereto in all respects, except that I wish to say that I think Cowe had spoken to me, or I had overheard him speaking to another workman at Dunecht about the closing up of the vault on account of a smell sometime previous to the day of the Cattle Show. I think I brought up the subject on the day of the Cattle Show.

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court,  
Oct. 23 & 24.

---

 Violating  
Sepulchre.

‘The Sheriff stated to the prisoner that the late Lord Crawford’s body had been found since the prisoner had been last examined; whereupon the prisoner said, I am very glad to hear that. They did not get it through me, at all events. Interrogated, Do you wish to say anything more upon the subject? Declares, I do not. Interrogated, Do you still wish to say that you were not concerned in the abstraction of the body or in the depositing of it in the place in which it was found? Declares, Certainly.’

The Procurator-Fiscal at this stage stated, as instructed by Crown Counsel, he now proposed that the examination should be adjourned to Dunecht; and he presented a petition for a warrant to remove the prisoner in custody there, with the intention of showing the prisoner the dead body and the place in which it was found. This declaration was then read over to the prisoner. All which he declares to be truth, and the Sheriff adjourned the examination until he and the witnesses to this declaration should arrive at Dunecht.

‘At Dunecht the same day, at a quarter to two o’clock afternoon, in presence of the said Sheriff-Substitute and witnesses, compeared the said Charles Soutar. Declares, I now hear Sergeant Brandie and Sergeant Adam of the Aberdeenshire Constabulary state that the hole, close beside which I am now standing, is the hole or grave in which the body of the deceased Lord Crawford was found. Interrogated, Is that the place in which you saw the dead body of a man, as described by you when you were formerly examined? Declares, I cannot say; I am not acquainted with this part of the woods. The prisoner being again interrogated, Was this the wood in which you were tripped and threatened at the time you saw the face of the dead man? Declares, I do not wish to answer any further questions on the subject. I have given all the information that I have to give. There being read to the prisoner from the letter sent by him to Mr Alsop and headed, “The late Earl Crawford,” the passage beginning, “Had Mr Yeats acted on the hint,” &c. (see page 78), and being asked if he had any explanation to give, declares, I meant that before the matter was noised abroad, I could have given Mr Yeats private information where the body was. Being further referred to the P.S. to the said letter, declares, I meant thereby that the perpetrators of the deed might take it away. Further declares, I wrote the letters mentioned in my former declaration to Mr Yeats and to Mr Alsop for the purpose of unburdening my mind, and giving a hint which might

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

be acted upon. I had nothing to do with the moving of the slab at the vault in the end of November. I have not been in the neighbourhood of Dunecht since July last year. I believe the place in which I saw the face of the dead man was somewhere about where I am now standing. I removed the sticks and earth from the body that I found in the wood with my hands. There were 5 or 6 inches of earth. The night was not raining but very cloudy. I don't recollect if there was a moon. All which I declare to be truth.'

After the above had been read over to and signed by the prisoner, the said Sheriff-Substitute, the witnesses to this declaration, and the prisoner proceeded to the House of Dunecht where the examination was resumed.

' Being shown a dead body in a leaden coffin, declares, I now hear Mr William Yeats, advocate in Aberdeen, Michael Fraser, gamekeeper, Dunecht, and James Fraser Smith, gardener, Dunecht, identify it as the body of the late Lord Crawford. Interrogated, Did you ever see that body before? Declares, It bears some resemblance to the face of the body I saw in the wood as described in my former declaration. I think it is the body, the face of which I saw there. I saw no part of the body except the face and neck. I did not see it before I saw it buried in the wood. The colour when I saw it in the wood was brown, not quite so dark as now. Being shown three pieces of blanket with coloured striped border, and asked if these resemble the blanket in which the body was wrapped when he saw it in the wood, declares, I did not observe particularly. I know it was in a blanket. Being shown a phial containing a colourless liquid labelled benzoline, declares, That is not the smell I perceived from the blanket. Being shown a sealed bottle, the seal of which was broken in my presence, and having smelt its contents, I declare that that is the smell that I perceived on the blanket and body in the wood. The said bottle with its contents is sealed up again in my presence, and a label is attached thereto duly subscribed by me, the said Sheriff-Substitute and the witnesses to this declaration as relative hereto. The said phial is also sealed up, and a sealed label is attached thereto, and is duly docketed and signed by me, the said Sheriff-Substitute and the witnesses to the declaration as relative hereto, all which I declare to be truth.'

The SOLICITOR-GENERAL here closed the Case for the prosecution.

The SOLICITOR-GENERAL, in addressing the jury, submitted that the character of the crime precluded direct evidence being produced unless through an accomplice. The Case was one of facts and circumstances, all pointing to the prisoner being at least one of the perpetrator

of the crime. The Earl of Crawford died at Florence in 1880, and it was well known in the neighbourhood of Aberdeen that his body had been brought to Dunecht, and interred there on 29th December 1880. The motive of the crime was to recover a ransom or reward for the recovery of the body, and it was plain that it was to some one in the neighbourhood that the idea of its perpetration must have first occurred. The prisoner resided in Aberdeen, and knew Dunecht well. The winter of 1880-1881 happened to be a severe one, there having been snow on the ground till a late period in spring. It was necessary therefore that, in order to avoid discovery, the perpetration of the outrage should be delayed, and the whole evidence consequently pointed at the crime having been committed about the end of May 1881. On Sunday, 29th of May 1881, an unusual and peculiar odour is first discovered in the neighbourhood of the vault, which was at first naturally, although erroneously, attributed to the shrubs which composed the wreaths that had been placed in the vault, but there could be no doubt now that the aromatic smell which was then felt must be connected with the opening of the vault on the 27th or 28th of May, and that it proceeded from the open coffin in which the body of Lord Crawford had been laid. The masons perceived the odour, and one of them observed on the morning of Monday, 30th May, an open crevice between the outer flags, which formed the covering of the entrance to the vault—just such a crevice as would have been caused if the flag had been raised and the vault had been entered. That crevice, which was due to the fact that the stone had been lifted and the tomb violated, was filled up with lime and cement that morning. On the Friday before, viz., on the 27th, the prisoner was proved to have gone by the 'bus to Waterton of Echt, where he arrived at 6 P.M., and after having some refreshment, he was seen to go along the road towards the village of Echt, which is on the other side of the Dunecht policies. He was thus

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.



1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

proved to have been in the immediate neighbourhood shortly before the time above alluded to, and there was no explanation offered as to how he spent that Friday night. The slabs over the vault having been cemented to keep in the odour, the ground was then covered with earth and sown down with grass seeds on the Thursday following. The odour was thus evidently misunderstood, and the attention of the family was not directed to its true cause. It was evident, also, from what had been done, that all trace of the removal of the body was in a fair way of being obliterated. But the hope of reward depended for its fruition upon discovery. It became necessary, therefore, if the object for which the crime was committed was ever to be realised, that something should be done to bring the removal of the body to the knowledge of the family. The prisoner was next heard of frequenting the neighbourhood. He was seen at the Waterton inn in the end of July or beginning of August, by Mrs Leggatt, and again there was no explanation of what he was doing there at that time, although he admits that he was there once or twice. Things had not been proceeding satisfactorily for the success of his project, and so he visited the spot. He doubtless found that the grass was growing over the vault, and that accidental discovery was becoming every day more impossible. He, therefore, on 8th September 1881, wrote and sent the first Nabob letter, and addressed it not to the police, through whom he could have got the protection, which, according to his own story, if it had been true, he wanted, but he sent the letter to Mr Yeats, the agent for the Crawford family—the person who would be the source of any ransom or reward. But this failed. Mr Yeats threw the letter aside and took no notice of it. The Crawford family were still in ignorance. The prisoner was, therefore, compelled to take a bolder step, viz., to go again to the neighbourhood; but this time he went to Livingstone's inn at Echt, where he met Lawrie. That was on the 20th September. There he threw out



to Lawrie on that occasion mysterious but very direct hints, about a foul occurrence, saying that the body of a murdered man was buried in the woods at Dunecht—just such hints as were calculated to spread the belief in the neighbourhood that something had occurred and would lead to enquiry. But, for his own protection, he made his information too vague. It was treated as unfounded, and his purpose of bringing it home to the proper quarter, as a necessary preliminary step to his obtaining a reward, again miscarries. At last a stronger step had to be taken—more certain means had to be used to attract attention; and on 30th November 1881, the outer stone covering of the vault was displaced for the purpose of attracting attention. An unsuccessful search for the body was then made. Advertisements were put into the papers, and at last a ransom was offered, and hopes of pardon held out, but under the unfortunate condition—unfortunate for the success of his project—that the informant must not be the person who actually committed the offence; and so Soutar was again frustrated. The advertisements being thus unsatisfactory, he next wrote the second Nabob letter dated 23d December 1881. Again he did not go to the police for protection, as would have been the natural course if the story in his declaration had been true, but to those who would be the source of a reward. He sent this letter to Mr Alsop, Lord Crawford's agent in London. But Mr Alsop took no notice of it. Being again foiled, he at last put himself in communication with his friend Machray, and endeavoured through him to put himself in communication with Mr Cassells, who, as representative of the Crawford family, was making enquiries at Aberdeen. But he was again unfortunate. Cassells was not at home. Machray communicated with the police, and Soutar was apprehended. He then emitted the declarations which are altogether incredible. They show at all events that the pursuer was in the wood when the body was placed where it was found. The

1882.

No. 8.  
Charles  
Soutar.High Court  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24Violating  
Sepulchre.

story there told was most cunning and highly dramatic. But it was most unnatural to suppose that if it was true that he met the four men in the circumstances described they should seize and detain him, when these men would, in the circumstances, rather have desired that he should have escaped. He there said that it occurred at the end of April or beginning of May, but that was clearly false, and was antedating it by a month, as the evidence about the odour showed. The statement that he only discovered that it was Lord Crawford's body after he had communicated with Cowe, the plasterer, was denied by Cowe, and was also false. But if it was true, as the pursuer said, that he became aware about that time for the first time that the body in the wood was that of Lord Crawford, that was on the 21st of July 1881, because he met Cowe on the day of the Aberdeen Cattle Show, and a few days after that he went, he said, to the tomb to verify his suspicions. Therefore when he met Lawrie at Livingstone's Inn at Echt on the 20th September 1881, and although nobody else knew at that time that the outrage had been committed, he knew that it was Lord Crawford's body that was in the wood. Why then did he represent to Lawrie that the body which he said was buried in the woods was that of a murdered man? But if Cowe was to be believed when he says that the prisoner had no such conversation with him as was alleged in the declaration, the question arose, how did the prisoner come to be aware that it was the body of Lord Crawford which was in the wood before it had become known to anyone else, unless it was from a guilty participation in the commission of the crime? The case for the Crown, stated briefly, was that, on the prisoner's own confession, he wrote the first and second letters signed 'Nabob' to those who were representing Lord Crawford, carefully abstaining all the time from communicating with the police; that he alternately, step by step, disclosed hints and statements for the purpose of directing attention to what had occurred; and

ultimately took the step of sending a message to the representative of Lord Crawford for the purpose of opening up negotiations with him ; and that, finding himself unexpectedly in the hands of the police as a consequence of making that statement, he set about weaving the tissue of misrepresentations contained in his declarations for the purpose of giving a colour to some of the facts which his intelligence made him aware were too clear to be disputed, giving a narrative so utterly incredible in itself that it could not be believed. And if that was false, then what the prisoner had admitted, taken with the rest of the evidence, clearly established that the mystery had at last been solved, and that the prisoner was one of the persons who perpetrated this outrageous crime.

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court  
Oct. 23 & 24.

---

 Violating  
Sepulchra.

The DEAN OF FACULTY contended that it was admitted that the crime was one which could not have been committed by the panel alone, and the mystery was therefore only half solved. It was said that it was not explained why the prisoner was in the neighbourhood, and what he was doing on the night of the 27th of May ; but at the same time it was clearly and most carefully proved that he was a notorious poacher, who had been dismissed from service on this very property on account of poaching. That he was poaching on the occasions referred to in the evidence sufficiently explains everything. According to that evidence, there was no secrecy in what he did. If the theory of the prosecution was correct, that the crime must have been committed on the night of the 27th or 28th of May 1881, the prisoner travelled on that date in a crowded 'bus in broad daylight, and was set down, not at the nearest point to Dunecht House, the scene of the crime. But it had been unwarrantably assumed that it must have been committed on that night, because the odour was perceived for the first time on the 29th of May, two days afterwards. The evidence that it proceeded from the *arbor vitæ* was just as strong as the evidence that it proceeded from the open coffin in

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

the vault, and it was quite clear that the cause of the odour might have existed weeks before it was perceived; therefore the foundation of the whole argument for the prosecution—viz., that the crime must have been committed on the 27th or 28th of May—fell to the ground. It was also a far-fetched argument to say that because the prisoner had endeavoured to spread the report that a man had been murdered, and that he was buried in the woods, the prisoner must be held to be guilty of violating this tomb, because there was proof that he knew at the time that he was spreading these reports that it was Earl Crawford's body that was buried in the woods. The prisoner's statement that he did not know that it was the Earl of Crawford's body until his interview with the plasterer Cowe was not contradicted by the evidence of that witness, which amounted at most to *non memini*. And as to the statement of Soutar in his declaration as to the date when the body was buried in the woods, as he admitted in his declaration that he was present on the occasion, it was unnecessary to consider whether he was correct in saying that it was at the end of April. In terms of the other evidence it was quite as likely to have taken place then as a month later. The story told in his declaration was quite consistent with all that the prisoner had previously said. If publicity and a reward was the object which the perpetrators of the crime had, according to the theory of the Crown, in view, it was quite consistent with that that the prisoner should be seized in the wood and bound to secrecy in the circumstances he described in his declaration; because, if the true perpetrators of the crime had so become aware that the prisoner and others knew where the body was, and that the crime had been committed, that knowledge placed the prisoner and them in the position of being able to obtain the reward, and also placed the persons who had been discovered in danger of being punished. Their interest was not, therefore, to allow the discoverers to escape. The prisoner's

position had been consistent from the first. He wished to get the reward, and he communicated with those acting for the Crawford family for that reason. Those agents were acting all along in concert with the authorities, and what the panel said to them was, 'I can disclose where the body is lying, on two conditions—first, that the true perpetrators of the crime be apprehended, and second, that he (Soutar) be protected.' If he was one of the perpetrators, it was surely a strange and dangerous position for him to take up—a position which tended to stimulate the authorities to be as active as possible, and that too while from the advertisements he knew that protection could not be extended to one who was concerned in the perpetration as a principal. But if it was assumed that the account he gave in his declaration was true, and that he was not concerned as a principal, the position he took became quite intelligible and reasonable. If the true perpetrators were apprehended he would be quite safe, and the family agents would, he knew, keep him safe. He was therefore right in applying to them, and the fact that he applied to them, and not to the police, was no reason for assuming his guilt. The stipulations which he made were the stipulations of an innocent man. And, on the whole, the prosecution was of a highly sensational case based upon a number of small points, which, if carefully examined, did not cohere, and it was therefore the duty of the jury to discharge.

LORD CRAIGHILL, in charging the jury, said.—It will now, gentlemen of the jury, be your duty to take into your consideration the evidence brought forward in this Case, and the argument offered upon that evidence; but before you proceed to discharge that duty, it is necessary that on this, as on other occasions, you should receive what assistance can be rendered by the Court. In many cases that is absolutely necessary, because of questions of law upon which the jury require to be directed by the Court. On this occasion, however, I am happy to say there is no con-

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

troverſy whatever between the parties in reference to the law. It may be ſaid, indeed, that this is a caſe in which there is no law which admits of any diſpute, and accordingly no diſpute whatever has been raiſed. The queſtion, therefore, is one abſolutely of fact to be determined upon the evidence given by the witneſſes. And I need hardly tell you that the determination upon matters of fact—matters of evidence, is a thing that reſts excluſively with the jury. The judge may have his opinion as to the true reſult. He may or he may not indicate in the courſe of his charge what that opinion is, and the jury out of courteſy may be expected to take ſuch an expreſſion of opinion into conſideration. The jury certainly are not bound, and are not entitled to act upon that opinion, unleſs it happens to coincide with theirs. What, then, I may offer in the way of comment upon the evidence is offered ſolely and ſimply that you may be aſſiſted in your deliberations. That which I ſay which meets with your approval, you of courſe will adopt; anything that I ſay from which you differ, you are not only entitled, but you are bound to diſmiſs from your conſideration.

Gentlemen, the caſe which is ſet forth againſt the priſoner is one with which in recent years I am happy to ſay we are unfamiliar, but it is one that is perfectly well known to the law; for in former times the violation of graves was not ſo uncommon a thing as recently it has become. Bodies were lifted that they might be made market of, and diſſected at medical hospitals. Thoſe who raiſed them got ſo much for the bodies they raiſed, and the body, after it had paſſed into the diſſecting-room, was turned of courſe to ſcientific purpoſes; and in a certain ſenſe that was an excuſe for the doing of it. Be that as it may, there has been no raiſing of bodies for ſuch a purpoſe for the laſt half century; and accordingly when it is ſaid that ſuch an offence has been committed, we muſt turn about and try if we can to diſcover another motive for the perpetration of ſuch a crime.



Now, so far as I am able to conjecture, there are only two motives by which persons who are said to have committed such a crime, or who are proved to have committed such a crime, can be influenced. The one is to wreak vengeance or ill-will upon the family or relatives of the deceased. You know well that there cannot by possibility be anything more harrowing to the feelings of surviving relatives than the lifting from the grave or the taking out of the burial vault the remains of him or her who has gone before ; and I can scarcely imagine any ingenuity more cruel or curious than that which would suggest the recourse to such a crime in order to spite or injure the feelings of surviving relatives. But I need not say to you that on this occasion no such motive has been or can be suggested. The family of the Crawfords in that district are not shown to have been unpopular, or to have incurred the displeasure either of the neighbours as a body, or of any particular individual in the neighbourhood. On the contrary, all we know about them leads to an entirely different conclusion. Therefore, if that was not the influencing motive, and it has not been suggested on any side that it was, the only other which could operate was the hope of obtaining for the discovery of the abstracted body such a reward as would be compensation or remuneration for all the trouble and risks which were incurred in the perpetration of the crime. And, accordingly, what is suggested here on the part of the prosecution, and I may say that which was adopted by the Dean of Faculty in his address for the prisoner, as the true motive—the thing by which this outrage is to be explained—is the hope of reward for the recovery or return of the body. The motive could not be the discovery of those by whom the outrage was committed, because the last thing that would influence any one to the perpetration of the crime would be that the perpetrators should be brought to justice. Rightly or wrongly, reasonably or unreasonably, it may be surmised that the reward was hoped

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.



1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

for, and yet that those by whom the offence was committed should not be brought to punishment. Thus it comes to be that what is urged upon you by the prosecutor is that there was this motive. And in connection with the facts which have been proved, all that the witnesses have sworn, and all that the prisoner has said, has effected the disclosure of this motive. The attempt to realise this motive is the characteristic of the conduct of the prisoner from the time when the offence was committed down till the time when in the month of July last he was taken into custody as a suspected person.

Gentlemen, the Solicitor-General yesterday suggested that crimes of this description were such as could seldom be brought to light by other than indirect evidence. Well, that may be, though I am not sure that it is. On thinking over the matter I have not been able to see why an offence of this kind, just like other offences, may not sometimes be proved, not by indirect, but, by direct evidence. But, be that as it may, the question which you have to determine is not whether the evidence is direct or circumstantial, but whether you are satisfied by it that the charge against the prisoner at the bar has been established. If that result upon your minds has been produced, it is matter of little consequence of what kind the evidence is. The competency of the evidence which has been brought forward has not been disputed, and the vital question is, not what is its kind, but what is its power? What is the effect which by that evidence has been produced upon your minds? If you are satisfied that by that evidence guilt has been brought home to the prisoner, the prisoner ought to be convicted. If, on the contrary, you are satisfied by that evidence not merely that the prisoner is not guilty but innocent, then upon that ground the prisoner ought to be acquitted. But I have to tell you, though perhaps you do not require to be informed, that if the evidence has left a doubt upon your minds as to whether the prisoner is or is not

guilty, in that case also the prisoner must be acquitted. Unless by this evidence you have been brought to the conclusion, without reasonable doubt, that the prisoner was art and part in the perpetration of this offence, the prisoner must be acquitted. Gentlemen, when I say art and part, I do so in order to introduce an observation which is not entirely unimportant. It is said in the indictment that the prisoner by himself, or aided by others unknown to the prosecution, opened the vault, and took away the body,—in other words, committed the offence for which he has been brought to trial. I think you will be satisfied as to that point, when you have heard that it was perfectly impossible that any one man could do that which was accomplished—the point I mean that the prisoner could not have done the thing himself. One of the witnesses said he thought that two men might do it. Well, there is no evidence to contradict that; but I should think it much more probable, looking to that which had been done, and looking to the way in which it was concealed, at least for a time, that there were more even than two engaged in the perpetration. It was not an easy task that was undertaken, but it appears to have been done with signal ease and signal success. For the vault was not only opened during the night, but it was closed in that same night, and remained closed for months and months on end after we now know the body had been taken away, and those who passed by never suspected what had occurred. So that there must have been not only strength but skill in the perpetration of this offence. Gentlemen, it was not merely the opening of the vault and the closing of the vault, which the witness told us he thought might be done by the men if they had plenty of time,—by which he meant if they had three hours in which to work,—but it was the removal of the body, the making of a place for the body, and the covering up of the body in such a way as, if possible, at least for a time, to evade all observation. We have no evidence upon the subject,

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

but I think it is not at all an improbable thing that the covering up of the body in the way in which it was covered up, as shown by the way in which it was afterwards found, was not the work of a single night, or of a single occasion, but was the work probably of repeated visits to the place where the body was originally deposited. But be that as it may, the thing of importance here probably is that this man at the bar of himself could not do that. There must have been others. Who the others were we have not been told, and probably it is of little importance with reference to the result of this trial, because, however many were present at the deed, however many were required for its execution, if the prisoner at the bar was present aiding and abetting the thing that was done, his guilt is the same as if everything had been accomplished by his own effort, and by his own skill. The law makes no distinction there. His guilt is just the same as it would have been if he had been the only offender. The question, therefore, comes to be, are you satisfied, or are you not, on the evidence adduced, that the prisoner was art and part in the perpetration of this offence?

Now, gentlemen, the first question is whether the vault at Dunecht was opened, and the body taken out? The second is, whether, if those things were done, the prisoner was concerned in the doing of them? Now, upon the first of these questions, there is no controversy. Witness after witness was brought forward to prove the death of Lord Crawford, the bringing of the body to this country, the burial of the body in the vault, and the closing of the vault after the burial service was concluded. The prisoner has nothing through his counsel to say against that; and it would have been a hopeless task to attempt to controvert anything that was said on that subject. And, accordingly, it may be said that a condition to the defence in this case, as well as a condition of the demand of the prosecutor for a verdict, is that whether the prisoner was concerned in the outrage

or not, this at least is certain, that the body of Lord Crawford was taken out of that vault, and was placed in the part of the wood where it was ultimately discovered. The thing, therefore, and it is in truth the only thing with which you have to grapple upon the present occasion, is the question whether the vault having been opened, and the body having been taken away, was the prisoner art and part in the removal of it? Now, gentlemen, in order to come to a conclusion upon that matter, I think you will have to go over in your own minds all the salient facts which have been brought out as points in the history of the case, and to aid you I shall endeavour to recapitulate, as shortly as I can, what those facts are.

Lord Crawford died at Florence in the beginning of December 1880; his body was brought home about the 24th of that month, and deposited in the vault at Dunecht on the 29th of the month. The vault was closed, the crevices between the flags were filled up with lime, and everything was done which at that time it was intended to do, and so far as the weather would permit. Indeed, there appears to have been only one thing which could not be performed at that time, and that was the introduction of cement into the crevices. The weather prevented that being done. Another thing that was to be done, apparently after the joints had been cemented, was to cover the flags with earth, and to sow grass seeds in the earth, in order that there might be green grass growing over the entrance to the vault. But all that was done in December 1880, was the closing up of the entrance, and the jointing with lime the crevices between the flags. Now from that day, the 29th December 1880, down to the 29th May 1881, nothing whatever is heard of the vault or of anything connected with the vault. But on that day, which was a Sunday, the housekeeper on her way from church was passing by the vault, and was struck with the smell which was coming out. She had passed the vault frequently, at least from time to time, but

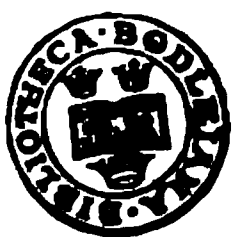
1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Sontar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

had never been sensible of such an odour before. She mentioned the matter to others. The smell was experienced by others on the following day, and the result was that all became satisfied that there was something by which the smell was produced within; but it led to no suspicion that there had been any interference with anything in the vault. It was thought that the joints were merely imperfect, and the builder was communicated with. He was sensible of the smell, and he proceeded to do that which would have been done, but for the weather, in the previous month of December. On the 1st or 2nd of June, therefore, the flags were jointed, earth was put over the flags, seeds were sown; and then it was thought that everything had been done by which any exudation of odour from the vault would be prevented. Now, with regard to this particular date in the end of May or beginning of June, there was more importance attached to it by my friend the Solicitor-General than I had been led to expect. He seemed to think it was of importance to the case of the prosecution that on the Friday before, the night between the Friday the 27th and Saturday the 28th, or between the Saturday and Sunday, was the time at which you should be led to think the vault had been entered and the body taken away. And the reason why he was disposed to attach importance to this was that it enabled him to say that the prisoner at the bar was in the neighbourhood at this time, and, therefore, that he had an opportunity so to speak of taking part in that which is assumed to have been done. And there is no doubt that, on the 27th of May, it is abundantly proved that the prisoner at the bar came out upon a 'bus from Aberdeen to Waterton, that he left the 'bus at Waterton, passed along the turnpike for a short distance until he met the road which called the Shoemaker's Brac; that he went up this road although how far we do not know. But this we know, that the village of Echt is two miles from Waterton, and that the policies of Dunecht and the vault



between these two villages. Where the prisoner went to we do not know ; and as it does not appear that the importance of this date was a thing that was known to the advisers of the prisoner, it is not in the least degree surprising that no explanation of his operations on that evening has been furnished. It is for the prosecutor, if the prosecutor is to attach importance to the matter, to show, if he can, that being in this neighbourhood Soutar engaged in the accomplishment of the purpose for which he is brought to trial. But, all that can be said is this, that we find the prisoner in this neighbourhood on the 27th of May ; but that where he went to after he was seen, and how he was engaged until he returned to Aberdeen, we have so far no knowledge at all. Apparently it was expected that evidence to the effect that the prisoner had made arrangements for his return to Aberdeen would also be forthcoming, but nothing of the kind was established by any answers to questions put to witnesses. And so with regard to this day. We know nothing whatever except that the prisoner was seen at Waterton, and also seen on the road from Waterton to Echt, on the 27th May. If that constituted any material part of the case, I should myself have thought that the case was poorly established. But still it is a thing that is to be taken into consideration along with other things, and you will deal with it and give it that weight which in the circumstances you think it entitled to.

Gentlemen, it was said that that 27th of May, or about that time, must be taken to be the date when the vault was rifled, because the odour was felt or noticed for the first time on Sunday, 29th May. Now the odour that was noticed was what has been described as a 'flowery smell,' as that of decaying of flowers. The witnesses described it in different ways. But then the gardener told us that the smell that met his nostrils was one precisely similar to that of *arbor vitæ*, a kind of wood used as a back for the wreaths put upon the coffin when it was put into the vault. Well, if that was to be

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchra.

the explanation of the thing, there would be no reason whatever to conclude that because the smell was encountered on the 29th of May, that is to be explained only by the removal of the body—by the rifling of the coffin and by the exposure of something to the atmosphere other than the body, which the coffin contained. There is, however, with regard to that matter this circumstance that the prisoner in his declaration tells us that when he touched the body his hand had an odour precisely similar to that which he says was afterwards described to him by the witness Cowe. So that whether there is or is not a smell—a flowery smell as it was described by some, or a smell of *arbor vitæ* as it was described by others—it cannot but be admitted or acknowledged in this case that there was something else that had a smell, if the prisoner tells us the fact that when he came upon the body, and touched the blanket, and removed his hand from the blanket, there was a smell which he perceived from his fingers. That smell, he says, was so strong that it remained even for half a day.

But, gentlemen, while I have noticed these things, it does not appear to me that great stress need be laid on the question whether or not the offence was committed between the 27th and 29th of May; or whether, as is said by the prisoner in his declaration, it must have been in the end of April or the beginning of May. About that time it seems to be clear the outrage *was* committed; and the question is, whether committed at the one time or the other time, you are satisfied upon the evidence that the prisoner was art and part in the perpetration of the offence. Now, the 29th of May is the first occasion after the burial on which any attention was turned by any one connected with the Crawford family to this vault. What is the next thing that takes place? On the 8th September 1881 there is received by Mr Yeates a letter signed 'Nabob,' and that letter is in these terms:—(*Reads* first Nabob letter, see foot of page 66).



Now, it seems to me to be quite plain that the person who wrote that letter knew that the vault had been rifled—that the body had been taken away; and it may be inferred also that he knew where the body had been deposited. That is plain. But more than that is plain. He knew quite well that the body had been taken away, and that there was exuding from the vault a smell as if of decaying flowers. So that he was not unfamiliar with what was occurring in the neighbourhood of Dunecht. But, says the Solicitor-General in regard to this, ‘this is precisely the thing which, in the circumstances, would have been done by one who was concerned with the taking away of Lord Crawford’s body. They took the body away influenced by mercenary motives—the hope of reward; but that reward never could be obtained unless the fact of the removal was brought to the notice of the family; therefore this letter is written, in order that the family might be led to the knowledge that the vault had been rifled. That is the way in which the prosecutor argues; and he further suggests that once they knew of the rifling of the vault, the offering of communications would be attempted with those who were acquainted with the place where the body was deposited, and a reward would be offered for the acquisition of that for the acquisition of which the offence was committed: for reward is said to have been the motive by which the writing of that letter signed by ‘Nabob’ was actuated. Now, gentlemen, there can be no doubt that the purpose of this letter was to bring the taking away of the body to the knowledge of the family. They had had no suspicions of it up to that time. That fact is abundantly proved by what occurred on the 2nd of June, when the joints of the flags which formed the roof of the entrance to the vault were cemented, and when earth was put upon these flags and sown down with grass. Accordingly, to allow the family of Crawford to remain in that state of ignorance would certainly not suit the purpose of the perpetrators of the offence.

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

The body might lie in the grave as it had been deposited there ; but the perpetrators would be none the better for that. It was, therefore, indispensable that the members of the Crawford family should be brought to know that the body was no longer in the vault in which it had been buried. Accordingly, this letter was intended to prompt the agent of the family immediately to make enquiry into the subject—the result, of course, being that the abstraction of the body would be discovered. Well, gentlemen, this letter produced no effect on the mind of Mr Yeats. He communicated with the person who had built the vault, and who had closed it in. But that man had such good faith in the sufficiency of his work, that he pooh-poohed the idea that this could be anything else than a very silly joke and a very wicked hoax. So that this attempt to bring the thing to the knowledge of the Crawford family on this occasion signally and surprisingly failed. What comes next? A communication by letter to the agent produces no effect ; and something that will admit of no hesitation is that which has to be performed. On the 1st of December the lid of the vault is found to have been opened. One of the flags has been raised upon one side to the extent of from 14 or 15 inches. It is supported in that position first by a plank, and afterwards by bits of wood placed between the plank and the flag, and in that position the roof of the entrance is allowed to remain. It is done during the night. It is done obviously, and could be done only for the purpose of bringing with absolute certainty and without fail, to the notice of the family, the fact that the vault had been rifled. Now, says the prosecutor, that is the prosecution of the plan which those concerned in the perpetration of the offence must have resolved on even from the beginning. Those concerned tried first one expedient and then another. They tried the expedient of writing—the letter first ; and when that failed, they actually—opened the roof of the vault. And there was no

mistake and no failure this time. The family were quickly brought to the knowledge that the vault had been rifled, although they could not tell when the rifling had occurred, much less where the body had been deposited. But as was to be expected, coming to the knowledge that the body had been removed, measures were at once taken which they thought would probably lead to the discovery, if not of the depredators, at least of the place where the body was to be found. And thus we find that in the *Aberdeen Evening Express* of the 6th, of the 9th, of the 13th, and of the 29th December 1881, which is the month in which the lid of the vault was lifted, several advertisements appear. The advertisement published on the 6th December is in these terms (*reads*, see page 81). That is an invitation to any one who had noticed anything suspicious at Dunecht in the course of the previous year to communicate their information. And what appeared on the 9th was this, 'Nabob. Please communicate at once.' (See page 81.) That is in the first column in large letters. The second of the 'Nabob' letters had not then been written, so that this advertisement must have referred to the letter which was written and received on the 8th of September; and the person who wrote that letter, if he saw this advertisement, would know very well that to which the advertisement referred. But immediately following that brief request appeared this advertisement (*reads*, 'All communications,' &c., see page 81). Here is an invitation to communicate with Mr Alsop—not with constable, or inspector, or any of the authorities, but with Mr Alsop, who was at Dunecht at the time. That, it was supposed, would afford facilities by which, more probably than in any other way, the result desired could be accomplished. But on the back of that, at any rate, there was no communication with Alsop, although not very much later a letter was received by him. Now, the advertisements which appeared on the 13th are these, and this is important, because here we find the first hint of any reward (*reads*, 'Fifty pounds

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

No. 2  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

reward,' &c., see page 81). Immediately below that is the second advertisement, which appeared in the paper of the 9th, relative to Mr Alsop, and I do not trouble you with reading it again. Now, just about the same time, between the 6th and the 13th. as we are told by Constable Brandie, there was circulated and posted up throughout the county a large placard, a copy of which I hold in my hand. It was in those terms (*reads*, '£600 reward,' &c., see page 81).

DEAN OF FACULTY.—I think that placard was published about the 30th.

THE JUDGE.—I understood it was about the 30th. At all events, these announcements appeared in the *Evening Express* on the 6th, 9th, 13th, and 29th.

LORD CRAIGHILL.—But on the 23rd December Mr Alsop had received a letter in the following terms:—It says this (*reads* second 'Nabob' letter, see page 78). Now that, in many respects, is a remarkable communication. It shows very plainly the knowledge of the person who wrote the letter with regard to the place where the body was deposited. It assumes that the body may be taken away, and that the writer had been in communication with the agents of the family; and last of all, in the postscript, there is a statement which is inconsistent with any idea that those who were the perpetrators of the offence were cognisant of the fact that an outsider knew that the offence had been committed. I think that seems to be plain from the postscript. And the importance of that you will probably take into consideration when you come to inquire who the person was who wrote those letters under the name of 'Nabob.' And there is no doubt about who that person is. It is the prisoner at the bar. He confesses that in his declaration. Therefore, what we have before us now is the fact that, so early as 8th September 1881, the prisoner was cognisant of the fact that the body of Lord Crawford had been removed, and of the place where it had been deposited; and also the fact that on

December 23rd he was aware that the body still remained in the place where it had been laid. Then, on the 29th, Mr Alsop published this advertisement, and on the 30th the placard I have read was circulated, coupling the reward with the conviction of the offenders. And there is no further communication between 'Nabob' and any one representing the family of Crawford.

1882.

---

 No. 8.  
Charles  
Soutar.

---

 High Court,  
Oct. 23 & 24.

---

 Violating  
Sepulchre.

A search, however, was being made for the body. It continued for fourteen days from the beginning of December, but the body was not discovered; and the search was interrupted by the fall of snow which began in that same month, and remained on the ground until well on into the spring. And what do we next hear about the case? It is this. That there is a conversation regarding it between the prisoner and a man named Philip, a shoemaker, who had been suspected of participation in the commission of the offence. Philip had been judicially examined, and had been returned to prison, but the evidence upon which he had been taken up not being corroborated by other evidence which justified his detention, he was liberated by the authorities on the 4th of March. Soon after that, he is seen by the prisoner on the streets of Aberdeen. The prisoner accosts him; they retire into a public-house, and in answer to a question put to that witness, the prisoner is informed that, in the course of the judicial examination of Philip, the prisoner's name was introduced. Ay, and more than that, the prisoner is informed that Philip had expressed an opinion that Soutar, meaning the prisoner, should have been in the place from which he (Philip) had come, meaning the prison. Now, it looks strange that nothing followed upon that at the time; but it is far more strange that evidence of that kind given here was not followed by questions directed to show upon what knowledge Philip had made such statements to the authorities. Not a question was put to him to ascertain the grounds upon which that opinion rested. You heard Philip examined, and neither the public prosecutor nor the

1882.

---

No. 8.  
Charles  
Soutar.

---

High Court,  
Oct. 23 & 24.

---

Violating  
Sepulchre.

counsel for the prisoner asked him a single question about that. Thus we have the opinion of Philip recorded that Soutar should have been in the place whence he had been released. Of course, I do not say that that should militate against the prisoner to any extent. But one would have thought that even yesterday, when we were inquiring into this matter, it would not have been too late to ask Philip what he knew about the prisoner. No question, however, was put, and the only surmise we can form on the subject is, that supposing such questions had been put, Philip could not have given any explanation which would have justified the asking. Still that communication between Philip and Soutar and that anxiety exhibited by Soutar to ascertain what Philip had said regarding him in his judicial declaration are not immaterial; because it suggests this question to you, whether or not, if, as Soutar says, he had nothing to do with the perpetration of the offence, and was only unwillingly a spectator of something which occurred when the perpetrators were concealing the body, he would have been so nervously anxious with regard to statements which might have been made by any one who had been apprehended on suspicion. That was soon after the 4th of March. The next incident we have in connection with the removal of the body is what occurred with the man Machray. He was by no means a very satisfactory witness. He spoke with hesitation, and his answers were as good as extorted. Still, we must take his evidence as we find it. He is a very important witness, because, not in the spring, but in the month of July 1882, he went to the authorities and his information communicated then was that upon which the prisoner at the bar was taken into custody. Now, Machray says that in the spring of this year—probably before the month of March—for it was in that month that he went on a fishing expedition to Braemar he met the prisoner, and the prisoner told him that he knew where the body of the Earl of Crawford was

deposited. Now, gentlemen, this is just another occasion upon which this man (the prisoner) presses his knowledge on the notice of others. He does not ask him (Machray) to do anything at that time, although he does later on. After Machray returned from Braemar he meets the prisoner again, and they have several interviews, each of which is more or less important. The first time to which he referred in his examination was the 14th of July. On that date, they went to a public-house kept by a man Wilson in Carmelite Street, in Aberdeen; and not only is there a repetition then of the fact that the prisoner knew where the body was deposited, but there is a request that Machray should go to a person of the name of Cassells, who had been employed for the purpose of making enquiries relative to the body, and who was thought to be in communication with the Crawford family, and would lead to the reception by the prisoner of the reward. Machray says he went to Cassells, but did not find him. He says that the prisoner and he met again on the following day, and that he (Machray) again went to Cassells, but did not find him. And these succeeding failures to find the party of whom they were in quest were followed by a third meeting between the prisoner and Machray on the links of Aberdeen on a Sunday. This resulted in a third visit by Machray to Cassells; and after a third failure to find him, Machray went to the police office—the result being that on the following day the prisoner was taken into custody, and the enquiries which have resulted in this trial were immediately begun. Gentlemen, I think these are all the occasions on which, up to the time when the prisoner was taken into custody, there is anything discoverable in the evidence relative to the vault, or to the body, or to those by whom the rifling of the vault had been committed.

But there is another incident to which reference must be made, for upon that also considerable stress has been laid. I refer to what occurred on the 20th September

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.



1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

in Livingstone's inn, in the village of Echt. You will remember that a man named Lawrie happened to be in that village on that day, when he was accosted by the prisoner at the bar; and when after that they had adjourned to a room in the inn for the purpose of taking refreshment, the prisoner made certain suggestions, of which you have already heard. I will read to you Lawrie's evidence on the subject. (*Reads Lawrie's evidence, see page 75.*)

Now, the value that is put upon this by the public prosecutor is this:—That this is one of the attempts which were made previous to the lifting of the slab at the vault in December 1881, or in the end of November in that year, to bring what had occurred to the notice of the family. The prosecutor thinks, in short, that this was an attempt to get circulated in that neighbourhood a report that a body was seen to be deposited in the woods of Dunecht a short time before; and that by the circulation of this report, the prosecutor holds Soutar imagined a search would probably be instituted; and that that search would lead to what was desired by him—either the discovery of the body, or the discovery of the person by whom information might be given. Of course, gentlemen, that is not very direct evidence, but it is a thing, nevertheless, which you are to take into consideration as being one of those mysterious communications which were made from time to time by the prisoner at the bar.

The real thing, however, upon which the result, according to my opinion, will come to depend is this, whether or not the knowledge which, at the latest, was possessed by the prisoner in September 1881 is to be looked upon as communicated to him in the way which he has explained in his declaration. It is quite true, gentlemen, that a person who is accused, as Soutar is here accused, is not bound to make any communication whatever. He is entitled to remain silent, and if the case can be proved, then, of course, he will be found

guilty. If it cannot be proved, then, of course, he is not to be blamed. But there are many cases when it is obviously the interest of the prisoner—indeed it is almost always a matter of necessity with the prisoner—that he should make some statements, for the purpose of escaping the imputation of guilt. If the prisoner at the bar, or any other person, is found in the month of September 1881, or December 1881, or at any particular time before this thing is known to the family, or to anybody except those presumably concerned in the perpetration of the offence, is found to be cognisant of the removal of the body, then, says the public prosecutor, it is hardly possible to escape from the conclusion that a person possessed of such knowledge as Soutar had must himself have been concerned in the commission of the crime. The prisoner, therefore, was brought before the Sheriff, and he had the opportunity of making explanations on this subject. Accordingly, he made a communication in the terms which I shall read; and what you must determine, after you make up your minds as to what was said by him, is, whether or not you are to accept all that as, in the circumstances, a sufficient account—a reasonably credible account—of the way in which he became possessed of the information of which he undoubtedly was possessed. The first examination of the prisoner takes place on the 17th July, and what he says at that time is this (*reads* declaration, see page 82).

Now, gentlemen, that is what has been said by the prisoner. He was in the woods in the end of April or the beginning of May—for that is the time mentioned in his declaration—he was there in pursuit of game, when he disturbed men who were engaged in concealing what turned out to be the dead body of a man. They threatened his life; they allowed him to escape, but they made him at the same time aware that if ever he should give any information relative to what occurred, they would take his life, if he was on the face of the earth. Now what is said by the prosecutor in refer-

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

ence to that is, that this is an explanation which cannot be received, because in itself it is perfectly incredible. Well, it is a very improbable thing, gentlemen. There is no doubt about that. But the question is, whether by possibility such things might occur. The thing *might* have happened; and, of course, if the prosecutor throws on the prisoner the burden of bringing evidence to show that what is in itself very improbable actually occurred, it is perfectly plain from this explanation that the prisoner can derive no benefit. But upon the bare circumstance of improbability, you may probably think it would be a harsh thing to conclude that the prisoner's statement might not, after all, be consistent with the truth. But there is more in the case than that. And the first thing that struck me with regard to that was this. It is not merely the improbability of the story in itself, but the further improbability that this man, let loose as he was in that way, should have thought it worth his while to go back to the place for the purpose of discovering that deed in which the four men had been engaged; nay more, and that he should so readily have found the dead body which they had been engaged in burying. He says it was covered with a heap of rubbish. Well, if it was left covered up by a heap of rubbish, the men must have come back again. But, then, at a subsequent part of his declaration he states that he was not familiar with this part of the wood. Yet it does seem a strange thing, that after hunting for two hours in other parts of the wood he should so readily find his way to the place where the body was concealed. It is perfectly certain that unless something was done to that body after the first time he was there, he could not so readily have found it. Because the witness, Michael Fraser, the gamekeeper, who was one of those ultimately concerned in the finding of the body—who made search in the beginning of December about the same spot where it was ultimately found—says that there was no external indication whatsoever that the body lay in that position.

I pray you to observe, gentlemen, that while the prisoner says he was confronted by those men—that he was threatened by them—he does not pretend that at that time he got any knowledge whatever of what the body was, or whose it was. There had been no whisper, he says, of the Earl of Crawford—no whisper of any name; and so, although he came to know from that which was said and done, that there had been a body buried there, yet he gained no information whatever as to the rifling of the vault, or the removal of Lord Crawford's body from that vault. Yet we know that in the month of September he was possessed of that information. Now, gentlemen, how was that information obtained? He proceeds to tell us that; for what he says is this (*reads* Cowe's evidence, top of page 75). You thus see that he became aware, from that communication which was made to him by the witness Cowe for the first time in the month of July, that there had been a rifling of the vault. To make quite sure that he made no mistake, he went out again and saw the body, however; and if you are of opinion on the evidence brought forward that this part of the statement is inconsistent with the truth, then you are left in this position, not only that you have the prisoner's knowledge of the fact that Lord Crawford's body was taken away, without his being able to show you how the knowledge was acquired, but you have this further fact that the story that he tells is disproved by the witness from whom he says he obtained the information. You thus see that a great deal in this case depends on the evidence which was given by the witness Cowe. Now what you have to determine upon the evidence of Cowe is this, whether it amounts to a negative of the questions put by the prosecution, or whether Cowe shelters himself behind the statement that he does not remember ever communicating the entire truth of which he is possessed. He is quite certain about the benzoline. He is certain that he never mentioned that word to any one. But what was said

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchra.

1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

by the Dean of Faculty on that point was, that Cowe does not give a decided 'No' to any of these questions at all. The Dean of Faculty says he simply states, 'I don't remember,' or 'I am not aware.' Now, gentlemen, it is for you to say whether you consider these answers satisfactory or not. Do you think the things could have occurred, and yet that they might have been forgotten? That, in my opinion, is hardly probable. But what you have to determine is, whether or not the answers given by this man Cowe to the questions relative to what passed between him and the prisoner at the bar amount to a negative of the statement which is made by the prisoner in his declaration. If you do not think there is a contradiction in this matter of the statement in the declaration which the prisoner makes relative to the source from which he obtained his information, that is a most important point for the defence. If, on the other hand, you should be of opinion that this part of the prisoner's statement is contradicted, and that he is not telling the truth when he says that he was first informed relative to the rifling of the vault in the course of the conversation which took place between him and Cowe, then, I think, you will find it difficult to come to any other conclusion than that the prisoner was possessed of guilty knowledge—by which I mean a knowledge which was derived only from participation in the commission of the crime. Believe, then, Cowe or not, and you will truly, as I think, come to the conclusion upon that question upon which, it may be, the result of the case depends. Gentlemen, you must take all that into account, as you will take all into account which occurs from the first to last. No one else seems to be interfering in the case at that time except the prisoner; and he alone seems to be possessed of the knowledge, which he seeks to make use of in the very way in which the perpetrator of the crime must have contemplated carrying out his object: for, as I have said, the ho-

of reward must have been the motive which led to the commission of the crime. 1882.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

Gentlemen, that is the case. I am sorry I have occupied so much of your time in going over the facts, and in reading to you that which was laid before you in the course of yesterday's proceedings. But the case is of great importance, and I was anxious to give you every assistance I could render. I am far from saying the case is one not of difficulty, but you must solve it as best you can. You must consider everything; and if you come to the conclusion that the prisoner is guilty—if you are satisfied of that, in consequence of the course he followed, in consequence of the letters he wrote, in consequence of your disbelief of that declaration which he made—then, the verdict which you will return will, of course, be a verdict of guilty. If, on the other hand, you have doubts about any material fact—much more, if after putting everything together you have still a doubt whether you will be warranted in convicting the prisoner, your duty—for the law requires it—is to acquit the prisoner. But, gentlemen, I need hardly warn you not to indulge in doubts of a fanciful character. Nor need I ask you to try to grapple with the question whether the prisoner is innocent or guilty. If you can come to the one conclusion or the other, you ought to do it. It is only after making the best effort that you can to answer 'yes' or 'no' to the question of guilt or innocence that you need to take refuge in that which is a legal verdict, viz.:—a verdict by which the prisoner shall be acquitted, because you doubt the sufficiency of the evidence. If you *do* doubt, then the prisoner is entitled to a verdict by which he shall be acquitted. That, gentlemen, is all that I have to say at present. You will be good enough to retire and consider all that you have heard, and make up your minds upon it; and when your mind is made up, you will report the verdict at which you have arrived, according

1882. to your idea of what is the truth and the justice of the case.

No. 8.  
Charles  
Soutar.

High Court,  
Oct. 23 & 24.

Violating  
Sepulchre.

The following was the verdict. The jury unanimously find the prisoner guilty as libelled..

LORD CRAIGHILL.—Have you anything to say, Dean of Faculty?

The DEAN OF FACULTY.—Nothing, unless your Lordship desires my aid as to precedents.

LORD CRAIGHILL.—I shall be obliged to you if you can mention any precedents. The only one I could find was one having reference to the opening of graves.

The DEAN OF FACULTY.—The usual sentence has, I think, been one of imprisonment. There was one case under the old form where the prisoner preferred to be banished.

LORD CRAIGHILL.—Is there any case of breaking into a vault?

The DEAN OF FACULTY.—I do not know, so far as decency is concerned, if that makes any difference.

LORD CRAIGHILL.—I don't know that it does, but it shows more determination.

MACKAY, A.D.—I have looked at the precedents; and while I concur that the sentence has generally been one of imprisonment, I submit that this case is of a kind entirely different. Almost all of the cases, with only a few exceptions, refer to cases of snatching bodies for the purposes of anatomical examination.

The DEAN OF FACULTY.—Or sale, which is rather worse.

MACKAY, A.D.—There is one case of taking a body from a house. *Mackenzie*, Inverness, May 1733. Burnett's Criminal Law, p. 124, foot-note.

The DEAN OF FACULTY.—That is theft.

MACKAY, A.D.—It was dealt with as a separate case. I am not able to refer your Lordship to any case of a vault being broken into.

LORD CRAIGHILL, in sentencing the prisoner, said—Any case of this kind is a great outrage upon public



decency, and upon the feelings of the relatives who survived. One can scarcely imagine any offence more cruel or more mercenary as regards surviving relatives. Many would prefer personal injury to that mental agony which has been inflicted by your misconduct. And it is not merely that that agony was inflicted as one sharp pang, but it was maintained for so long a time, and that too obviously for the purpose of obtaining in the end the reward that could not sooner be obtained, because it was steadily withheld. The body is taken away in the month of April, and the family, fortunately for themselves, are in ignorance of the outrage until the following December. For your own purpose, by and bye, communication was made to the effect that the body might be found, but notwithstanding all the searches which were prosecuted, it was not until the month of July, and after you had been taken into custody, and after your judicial examination before the Sheriff, that the body was recovered, and their agony terminated. But from December until that time they were left in the miserable condition of having been made aware that the vault had been rifled, and that the body of Lord Crawford was still beyond their reach. What they must have suffered we may imagine, although I believe it would be difficult to imagine the full extent of their agony. I know well, as has been said, for I was looking at the matter myself, that imprisonment is the severest punishment that has hitherto been awarded for an offence of this description, as I have no doubt that in each of those cases where imprisonment was given imprisonment was the appropriate sentence. But when I look at this case, at the coolness, the determination, the perseverance, the continuous heartlessness of the proceeding—when I look at its cold-blooded and mercenary character; and when I remember also that the strength of this vault was that which was violated, I cannot help thinking that, of its class, this is a case by itself, and that what was adequate punishment in those pre-

1882.

No. 8.  
Charles  
Soutar.High Court,  
Oct. 23 & 24.Violating  
Sepulchre.

1882. vious cases, where the same character of offence was  
 No. 8. punished, might not be, and in my opinion is not,  
 Charles adequate punishment on the present occasion. The  
 Soutar. sentence of the Court is that you be subjected to penal  
 High Court, servitude for a period of five years.  
 Oct. 23 & 24.  
 Violating Sentence, five years' penal servitude.  
 Sepulchre.

---

Present,

THE LORD JUSTICE-CLERK,

LORDS YOUNG AND CRAIGHILL.

JAMES ROBERTS, Suspenders.—*Rhind.*

AGAINST

WILLIAM HORN HENDERSON, Respondent.—*Brand.*

**SHERIFF — JURISDICTION — PERJURY — DECLARATION OF INFAMY — SEPARATION OF PARTS OF A SENTENCE—EVIDENCE, SHORTHAND WRITER'S NOTES OF—STATUTE 37 AND 38 VIC. C. 64, SEC. 4 (Evidence Further Amendment (Scotland) Act 1874)—SHERIFF-COURT, RECORDING EVIDENCE IN — INDICTMENT — SENTENCE — WITNESSES, DICTATING EVIDENCE OF—SHORTHAND WRITER'S NOTES —SUSPENSION.—**Held in a suspension of a conviction and sentence pronounced in the Sheriff-Court upon a charge of perjury, to which sentence a declaration of infamy was added, that it was incompetent to pronounce such a declaration in the Sheriff-Court, but that being separable from the rest of the sentence it might be expunged therefrom without vitiating the whole, and on the motion of the respondent, the Procurator-Fiscal, it was allowed to be expunged accordingly.

A criminal libel before a Sheriff and a jury which charged the crime of perjury committed in a civil action before a Sheriff did not set forth the *ipsissima verba* of the deposition upon which the charge was founded, but the tenor thereof according to the shorthand writer's notes; and it appeared from the evidence adduced at the trial that the Sheriff in the civil action had not himself dictated to the shorthand writer the evidence he was to record as directed by the 'Evidence Further Amendment (Scotland) Act 1874,' but that the deposition had been taken down in presence of the Sheriff in the manner which is in use in the Court of Session. It was objected in a suspension that the *ipsissima verba* of the deposition on oath not being set forth in the libel, the latter was

irrelevant ; and that as the deposition had not been taken down in the manner required by section 4 of the 'Evidence Further Amendment (Scotland) Act,' 1874, there was no proper record thereof, and no legal foundation for the charge. Held that no substantial irregularity having been committed in the proceedings, suspension of the conviction ought to be refused.

Observations on the mode of recording evidence in civil cases in Sheriff-Courts.

1882.

No. 9.  
Robertsv.  
Henderson.High Court  
Oct. 25.

Susp. &amp; Lib

THIS was a Bill of Suspension and Liberation at the instance of JAMES ROBERTS, mason, Bathgate, who was tried before one of the Sheriff-Substitutes of the Lothians (George Fisher Melville, advocate) and a jury on 28th August 1882 upon a criminal libel at the instance of the respondent, WILLIAM HORN HENDERSON, Procurator-Fiscal of Court, which charged the crime of perjury, and upon which a conviction and sentence was pronounced, sentencing the suspender to four months imprisonment with hard labour, and decerning and declaring him 'infamous and incapable of holding any public trust or of passing upon any inquest or assize in all time coming.'

The libel set forth that the suspender when adduced and examined on 24th October 1881 as a witness for Mary Moffat of Bathgate, the pursuer in an action of filiation against him, and also when adduced and examined on his own behalf as defender in said action, knowingly, wilfully, and falsely swore and deponed to facts and circumstances contrary to the truth, knowing the same to be so. The minor proposition of the libel did not specify the words used by the suspender Roberts in his said deposition on oath, but set forth the substance only of the deposition. It was stated in the Bill of Suspension, and admitted, that the deposition of the suspender along with that of the other witnesses in the proof in the civil action was taken down by a shorthand writer duly sworn in presence of the Sheriff-Substitute (Francis Home, Advocate), but that he did not dictate to the shorthand writer the terms or words of the suspender's deposition or those of any of the other depositions taken.

1882.

No. 9.  
Roberts  
v.  
Henderson.

High Court,  
Oct. 25.

Susp. & Lib.

It was also admitted that the suspender, in his judicial declaration emitted with reference to the charge of perjury, had adhered to the shorthand writer's notes of the deposition on oath as correct after having had them read over to him, and that these were embodied in the libel.

RHIND, for the suspender.—It was incompetent and illegal to pronounce a declaration of infamy in a case before the Sheriff Court. Such a sentence extends beyond the limits of the jurisdiction of the Sheriff. He is not entitled thereby to extend his jurisdiction. *Marr and others v. Stuart*, High Court, February 4, 1881; Couper, vol. iv., p. 407; Justice-Clerk's opinion, p. 416. And as that part of the sentence cannot be separated from the rest, the whole sentence, we submit, falls on this ground to be set aside.

BRAND, for the respondent, the Procurator-Fiscal.—This ground of suspension is not mentioned in the Bill. It was not raised in the case of *Marr and others* quoted, and the judgment upon the point in that case was pronounced merely *obiter*. The old Statute 1555, c. 47, did not restrict this punishment to the Court of Justiciary, and since then, although the practice has not been uniform, the declaration has been added by many Sheriffs to the sentences pronounced by them in cases of perjury. Lord Adam, when Sheriff of Perth, was in the habit of adding it to the sentences in the Sheriff Court there, and of restricting its operation to that county. At all events, it is quite separable from the rest of the sentence, and, looking to the doubt on the subject, I move the Court to be allowed to expunge it.

RHIND, for the suspender, objected that the whole sentence ought to stand or fall. Paley on Summary Convictions, 6th edition, p. 287.

The COURT held that the declaration of infamy was separable from the rest of the sentence, and it was allowed to be deleted accordingly. (See Interlocutor, p. 123.)

RHIND, for the suspender objected further.—It was

proved at the trial, and it is not disputed—indeed it will be seen on the face of the shorthand writer's notes—that the deposition on oath for which the suspender was convicted was not taken in the mode required by law. The evidence in the filiation case was taken by a shorthand writer, and although the Sheriff-Substitute was present at the taking of the proof, he neither took down the evidence himself nor did he dictate to the shorthand writer the words of the depositions, as required by section 4 of 37 and 38 Vic., c. 64, 'The Evidence Further Amendment (Scotland) Act, 1864.'<sup>1</sup> The shorthand writer was allowed to record what he pleased. There was no legal record of the deposition on oath. The oath was not taken down according to law or custom, and the notes were not, therefore, legal evidence of even the substance of the oath, and such an oath as could form the foundation of a charge of perjury. The suspender could not have such a deposition read over to him and signed. If the Sheriff did not himself take down the words of the oath and read them to the accused at the time, he ought to have dictated them to the shorthand writer. Dictation is substituted for, and comes in place of, the reading over of the oath to the accused. Further, the *ipsissima verba* of the deposition are not inserted on the libel. *Robert Maxwell*, High Court, January 31, 1865; *Irv.*, vol. v., p. 64; *Hume*, vol. i., p. 371; *Alison*, vol. i., p. 474.

BRAND, for the respondent.—The agents for both

1882.

No. 9.  
Roberts  
v.

Henderson.

High Court,  
Oct. 25.

Susp. &amp; Lib.

<sup>1</sup> Statute 37 and 38 Vic., c. 64, 'Evidence Further Amendment (Scotland) Act, 1874,' section 4. In every case of a proof in a civil cause or proceeding in a Sheriff Court in Scotland, and in every case of evidence being taken in any such cause or proceeding to lie *in retentis*, the following provisions shall have effect:—'It shall be competent to the Sheriff, on the motion of any party to the cause or proceeding and if he sees fit, to cause the evidence to be taken down and recorded in shorthand by a writer skilled in shorthand writing, to whom the oath *de fidei administratione* shall be administered, provided that the Sheriff shall himself dictate to the shorthand writer the evidence which he is so to record, and a note of the documents adduced, and any admissions made by the parties.'

1882. parties were quite satisfied at the time with the mode in  
 No. 9. which the evidence was taken down in the civil case, and  
 Roberts the shorthand writer's notes were not the only evidence  
 v. of the oath adduced at the trial. Besides the notes  
 Henderson. themselves, there was the evidence of the shorthand  
 High Court, writer himself, also that of the agents on both sides, all  
 Oct. 25. of whom concurred in deponing to their correctness.  
 Susp. & Lib. Moreover, the suspender himself, in the judicial declara-  
 tion emitted by him with reference to the charge of  
 perjury, declared, after having had the notes read over  
 to him, that they were correct, and he adhered to them  
 as containing his deposition on oath in the civil action.  
 We contend that 'The Evidence Further Amendment  
 (Scotland) Act, 1864,' does not impose the duty upon  
 Sheriffs of dictating to the shorthand writer every word  
 that is to be taken down. The word 'dictate' in the  
 enactment in section 4 must be construed reasonably ;  
 and if the Sheriff is present during the whole taking of  
 the proof, exercising a close supervision, telling the short-  
 hand writer when to take down *verbatim* what is said,  
 when to take down the question as well as the answer,  
 and when to leave out parts and abbreviate the proof, as  
 is done in the Court of Session, that amounts to dictating  
 in the sense and spirit of the enactment.<sup>1</sup> In the Sheriff  
 Court in Glasgow dictation is never practised. It is  
 also sufficient that the substance of what is contained in  
 the notes be set forth in the libel.

The LORD JUSTICE-CLERK.—We are not inclined to  
 interfere here with the verdict of the jury after full trial,  
 and the sentence of the Court which followed ; but at the  
 same time we think that the matters which have been  
 raised are weighty and important, and should in future

---

<sup>1</sup> Reference was also made to the similar enactments in 24 and 25  
 Vic., c. 86, 'The Conjugal Rights Act, 1861 ;' 29 and 30 Vic., c. 112,  
 'Evidence (Scotland) Act, 1866 ;' 31 and 32 Vic., c. 125, sec. 24,  
 'Parliamentary Elections Act, 1868 ;' 31 and 32 Vic., c. 100, sec. 37,  
 'Court of Session Act, 1868 ;' 30 and 31 Vic., c. 36, 'Debts  
 Recovery Act, 1867.'

be considered well both by public prosecutors and the Judge who takes the evidence.

In the first place, I cannot think that this is a good, in the sense of being a well or skilfully drawn indictment. In cases of perjury the words of the alleged perjury should be specifically set out as taken down. This is a serious objection to this indictment. But, I repeat, I am not prepared to give effect to it with the result of rendering nugatory the whole trial and procedure which followed. And so too in regard to the taking down of the evidence : that matter is a serious one also, but it is hardly sufficient to go on in a suspension of this kind. I cannot doubt that the intention of the Statute was that if the Sheriff did not take the evidence down by his own hand, he should dictate to the shorthand writer what he was to take down, and the reason was that doubts were entertained whether in country districts efficient and reliable shorthand writers would always be available. The other mode of construing the Statute has, we are told, now gone very far indeed ; but I think it would be well if Sheriffs would consider whether that practice is in accordance with the strict letter of the Statute, and whether it would not be better, and tend greatly to the conciseness and perspicuity of the evidence, if the Sheriffs would dictate what they think should go into the evidence. At present a great deal is often taken down which has no bearing on the case, and only tends to obscure the real point at issue.

But with these remarks I am of opinion that we should dismiss this appeal. The prisoner has been fairly tried, and the objections are purely critical, and do not go to the root of the question whether his guilt was proved or not.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor :—

*‘Edinburgh, 25th October 1882.—Having considered this Bill and heard counsel for the parties, pass the Bill so far as regards the declaration of infamy contained in*

1882.

No. 9.

Roberts

v.

Henderson.

High Court,

Oct. 25.

Susp. & Lib.



1882. the sentence complained of: Direct the Clerk of the  
 No. 9. inferior Court to delete from the sentence complained of  
 Roberts v. the words "*decerns and declares the panel James  
 Henderson. Roberts to be infamous and incapable of holding any  
 High Court, public trust or office, or of passing upon any inquest or  
 Oct. 25. assize in all time coming:*" Further, *quoad ultra* refuses  
 Susp. & Lib. the Bill and decerns.'

Agent for the Suspender—WM. OFFICER, S.S.C.

Agent for the Respondent—CROWN AGENT.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

ANDREW MACKENZIE and JOHN CAMPBELL, Appellants. — *Dean of  
 Faculty (Macdonald, Q.C.) and Kennedy,*

AGAINST

WILLIAM SUTHERLAND FRASER, Respondent.—*Sol.-Gen. (Asher, Q.C.)  
 and Mackay.*

SUMMARY JURISDICTION—SHERIFF—MOBBING AND RIOTING—INVAD-  
 ING OF LOCKFAST PREMISES—MOB, AIDING AND ABETTING—SEPARA-  
 TION OF CHARGES—SUMMARY JURISDICTION (SCOTLAND) ACTS, 1864  
 and 1881.—Objection, that it was incompetent for a Sheriff to try,  
 under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881,  
 charges of mobbing and rioting, and breach of the peace, and  
 taking violent and masterful possession of lockfast premises,  
 repelled.

Terms of a summary complaint charging two persons with these  
 crimes, by being present, and actively engaged with, and aiding  
 and abetting a mob in the actual perpetration of the offences, upon  
 which it was held, on appeal, that the Sheriff had competently  
 convicted the accused of breach of the peace and taking violent  
 and masterful possession of lockfast premises after the charge of  
 mobbing and rioting had been withdrawn by the prosecutor. It  
 being held that the personal charges under which the accused were  
 convicted were separable from the charge of mobbing and rioting.

THIS was an appeal upon a case stated at the instance  
 of ANDREW MACKENZIE, mason, and JOHN CAMPBELL,

labourer, both residing at Muie, in the parish of Rogart and county of Sutherland, against a conviction and sentence by the Sheriff of Ross, Cromarty, and Sutherland (Mackintosh) ; also a Bill of Suspension and Liberation, at the same instance, to obtain suspension of, and liberation from, said conviction and sentence, which was obtained upon a summary complaint, at the instance of the respondent, WILLIAM SUTHERLAND FRASER, the Procurator-Fiscal, and which set forth—

1882.

No. 10.  
Mackenzie  
and Another  
v.  
Fraser.

High Court,  
Oct. 25.

Appeal, also  
Suspension.

That Andrew Mackenzie, a mason, and John Campbell, a lotter or labourer, both now or lately residing at Muie, in the parish of Rogart and county of Sutherland, have both and each, or one or other, of them been guilty of the crimes of mobbing and rioting and breach of the public peace, and of attacking, invading, and taking violent and masterful possession of a lockfast dwelling-house and barn, or of one or other of said crimes, actors or actor, or art and part, in so far as on the 7th day of August 1882, or about that time, a mob, or great number of riotous and evil-disposed persons having wickedly and feloniously assembled in a riotous and tumultuous manner, and in breach of the public peace, at or near to the dwelling-house at Muie aforesaid, then occupied by the said Andrew Mackenzie, for the illegal purpose of obstructing officers of the law in the execution of their duty, and preventing them from putting into execution a warrant of your Lordship for the ejection of the said Andrew Mackenzie from the said dwelling-house and barn ; and the said mob or great number of riotous and evil-disposed persons having so assembled for the said illegal purposes, did, in a violent, riotous, and tumultuous manner, and in breach of the public peace, and while George Swanson, one of the sheriff-officers of Sutherlandshire, residing at Thurso, along with John Stewart, also a sheriff-officer of said shire, and other assistants, were engaged in carrying into execution a warrant of ejection against the said Andrew Mackenzie, did *attempt to enter the said dwelling-house* while the said officer and his assistants were so engaged and did *use threatening and abusive language towards them* ; and the said officer having, notwithstanding said obstruction, carried into execution his said warrant, and having ejected and output the said Andrew Mackenzie and his whole effects from the said dwelling-house and barn, and having secured the same by means of lockfast padlocks, and otherwise, the said mob, or great number of evil-disposed persons, did immediately, or soon thereafter, attack and invade the said dwelling-house and barn, and break open the doors thereof and enter the same, and input thereto the effects of the said Andrew Mackenzie, which had been removed therefrom as aforesaid, and did thus obtain

1882. forcible possession of the said house and barn ; and the said Andrew  
 — Mackenzie and John Campbell were both, and each or one or other  
 No. 10. of them, present at and actively engaged with the said mob or great  
 Mackenzie and Another number of evil-disposed persons, and *did excite, encourage, assist, aid,*  
 v. *and abet them in the said several acts of mobbing and rioting and*  
 Fraser. *breach of the peace and invasion.*  
 High Court, Oct. 25.

Appeal, also  
 Suspension.

It was stated in the Case on appeal that—

‘ The appellants stated as preliminary objections to the competency of the procedure (1.) That it was not competent to try the charges in the complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881. And with respect to the relevancy (2.) That there was nothing in the minor proposition to connect the appellants with attacking and invading and taking violent possession of a dwelling-house and barn. The charge against them being really aiding and abetting the mob.

The Sheriff repelled the objections, and the appellants having pleaded not guilty, evidence was led for the prosecution and for the defence. The facts proved were, in the opinion of the Sheriff, substantially as set forth in the minor proposition of the complaint. The Procurator-Fiscal, in his address, stated that he did not press for a conviction of mobbing and rioting. The appellants thereupon objected that the charge of mobbing and rioting being withdrawn, the charge of attacking, invading, and taking violent and masterful possession of a lockfast dwelling-house and barn was irrelevant, and could not be insisted in. The Sheriff repelled the objection, and found the appellants guilty of the remaining charges of breach of the public peace, and attacking, invading, and taking violent and masterful possession of a lockfast dwelling-house and barn, and sentenced them to be imprisoned—Mackenzie for the space of thirty days, and Campbell for the space of fourteen days.’

The questions of law for the opinion of the Court of Justiciary were :—

1. Whether the charges in the major proposition

could be competently tried under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881? 1882.

2. Whether the species *facti* charged in the minor proposition are relevant to support the charge of invading and taking masterful and violent possession of a lockfast dwelling-house and barn. No. 10.  
Mackenzie  
and Another  
v.  
Fraser.  
High Court,  
Oct. 25.

3. Whether, after the charge of mobbing and rioting had been withdrawn by the public prosecutor, the charge of invading and taking violent and masterful possession of a lockfast dwelling-house and barn could, in the circumstances stated, be insisted in? Appeal, also  
Suspension.

MACKAY, for the respondent, objected to the competency of the bill of suspension. By section 9 of the Summary Prosecutions Appeals Act those who obtain a Case stated on appeal are deprived from appealing in any other manner of way to any superior or other Court.

KENNEDY, for the suspenders and appellants.—That section was intended merely to preclude other modes of appeal competent under special statutes, for example, under the Public-Houses Acts or the Weights and Measures Act; besides the term appeal in that section does not include suspension. The suspension is here raised to obviate any objection being taken to the competency of discussing the first question stated in the case, viz.: ‘Whether the charges in the major proposition could be competently tried under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881?’ It might be maintained that in terms of the interpretation clause of the Summary Prosecutions Appeals Act, 1875 (38 and 39 Vic., c. 62, sec. 2), the provisions of that Act applied only to causes which may be brought and tried under the Summary Procedure Act of 1864; and if that were sustained it would be incompetent for this Court to consider by way of appeal under the Appeals Act of 1875 a plea to the effect that the cause was not one which could be tried under the Procedure Acts of 1864 and 1881. But if that question can be discussed under the Case stated on appeal, the Bill of Suspension is superfluous.

1882. The Court intimated that there being no objection taken to the competency of the Case on appeal, they would consider and answer the questions stated by the Sheriff therein.

No. 10.  
Mackenzie  
and Another  
v.  
Fraser.

High Court,  
Oct. 25.

Appeal, also  
Suspension.

KENNEDY, for the appellants, contended on the merits—A charge of mobbing and rioting cannot be competently tried by a Sheriff under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881. All persons have a constitutional right to be tried, at all events for serious offences, by a jury, the exceptions to the general rule being admitted only on the ground of necessity or the trifling nature of the offence. Hume, vol ii., pp. 138 and 147-149; Alison, vol. ii., pp. 53 and 58, and cases there cited. *Bute and Spouse v. More*, High Court, Nov. 24, 1870; Couper, vol. i., p. 495 at p. 512. The test as to whether a particular charge is one which it is competent to try summarily, is not the amount of punishment or penalty concluded for—otherwise every crime but the pleas of the Crown would be tried in that way—but the nature of the crime and of the penalty which the law awards. Mobbing and rioting is a grave crime, formerly taken cognisance of by the Privy Council, and for which, upon conviction, penal servitude has not unfrequently been inflicted. *Michael Hart and others*, High Court, Nov. 10, 1854; Irv., vol. i., p. 574. It belongs also to the class of political offences, frequently merging into sedition or even treason, which are considered peculiarly inappropriate for trial by judges without the aid of a jury.

LORD YOUNG.—But you are assoilzied from the charge of mobbing and rioting. What interest have you in appealing against that?

KENNEDY, for the appellants.—Acquittal implies that the charge was competent, although it failed or was abandoned on evidence. If it was incompetent to try us at all, it was incompetent either to convict or to acquit. *Ferguson v. Thow*, High Court, June 30, 1862 Irv., vol. iv., p. 196. *Lastly*, the appellants were not charged in the complaint with doing the several acts

set forth as constituting the offences therein charged, but with aiding and abetting the mob in doing them. It is set forth, no doubt, that they were present at and engaged with the mob ; but the usual mode of charging participation in the crime of mobbing and rioting is to aver that the persons charged formed part of the mob. And when the charge of mobbing and rioting was withdrawn, and the appellants assoilzied therefrom, it was incompetent to convict them of the remaining offences of breach of the peace and attacking, invading, and taking possession of a lockfast dwelling-house. Although it may be said that the appellants were present with the mob, they are not said to have formed a part of it, or themselves to have done any of the acts libelled. If there was no mob there could be no aiding and abetting of what was never done. *James Farquhar and others*, Aberdeen, Apr. 30, 1861, Irv., vol. iv., p. 28. In assoilzing the appellants from the charge of mobbing and rioting the Sheriff must have held either (1) that there was no mob and no riot, or (2) that the panels were not present with the mob, or (3) that at least they were not aiding and abetting the mob ; and on any of these alternative suppositions the conviction is bad. On which of them the Sheriff proceeded cannot be determined, as the grounds of the conviction are not set forth in the Case, but in any view it was, we contend, incompetent.

The respondent was not called upon to reply.

THE LORD JUSTICE-CLERK.—I must own that I have been unable to ascertain upon what grounds this Case has been presented, or what the result is which the parties expected to reach. The only sort of doubt affecting the propriety of the Sheriff's judgment arises from the somewhat lenient act of the prosecutor in abandoning the more formidable part of the indictment—that of mobbing and rioting. In regard to the indictment I think that it is a perfectly good indictment against these persons as having been actively concerned with the mob, and that it is also a good indictment

1882.

No. 10.  
Mackenzie  
and Another  
v.  
Fraser.

High Court,  
Oct. 25.

Appeal, also  
Suspension.

1882. against the men as individuals of their being actively  
 No. 10. engaged in the objects with which the mob were en-  
 Mackenzie gaged, and in the attacking the house and barn. It was  
 and Another v. said—and that was the only plausible objection—that  
 Fraser. the charge of mobbing and rioting having been departed  
 High Court, from, no sufficient charge against these individuals re-  
 Oct. 25. mained to entitle the Sheriff to find them guilty as he  
 Appeal, also has done. In the case of *James Farquhar and others*,  
 Suspension. Aberdeen, Apr. 30, 1861, Irv., vol. iv., p. 28, the alle-  
 gation of a common purpose was at the foundation of  
 the charge, and it was held that in the absence of such a  
 common purpose it was not competent to convert the  
 case into a personal charge against certain individuals.  
 But here there is not only a charge of mobbing and  
 rioting, there is also, as I have said, a good personal  
 charge against certain individuals of invading these  
 premises, and that being so, the Sheriff was perfectly  
 entitled to convict them of that personal charge.

It was also said that the Sheriff was not entitled to  
 try a case of mobbing and rioting without a jury. I  
 have heard no argument whatever to suggest that the  
 slightest miscarriage has arisen from his so trying them.  
 No doubt there may be cases of mobbing and rioting  
 which it would not be proper that the Sheriff should try  
 alone—cases in which strong political feeling is involved.  
 But it is out of the question to maintain that this is  
 a case of that kind, or that it amounts to more than  
 an offence which may be tried and punished sum-  
 marily. On the whole matter, I have seldom seen a  
 suspension brought on more slender and, for the most  
 part, untenable grounds.

LORD YOUNG.—I agree, and I desire merely to add  
 that my only doubt—and it was a momentary doubt—  
 was whether the indictment was not so interwoven that  
 it was impossible to unravel from it an individual and  
 personal charge, once the charge of mobbing and rioting  
 had been withdrawn. But I have come—and without  
 any serious difficulty—to the conclusion that the prose-



cutor in withdrawing the charge of mobbing was withdrawing only the harder name for what these persons were charged with having done. What is stated in the indictment is, that these persons, along with others, threatened and used abusive language to the sheriff-officers, and attempted, without success, to obstruct them in carrying out this eviction of one of the accused, but that when the officers' backs were turned the mob, including the accused, broke into the house and restored the evicted tenant. That is the substance of the thing, and without giving it any name, I think that it is a sufficient specification of a good charge against the accused as individuals. As to the contention that the Sheriff should have tried this case with a jury, I have no difficulty in concurring.

1882.  
 No. 10.  
 Mackenzie  
 and Another  
 v.  
 Fraser.  
 High Court,  
 Oct. 25.  
 Appeal, also  
 Suspension.

LORD CRAIGHILL.—For a considerable time I shared the doubt of my brother Lord Young. I was not sure whether the charge of mobbing and rioting did not so affect the other charge as to leave no relevant charge at all when the mobbing and rioting was withdrawn. But I have come to see that the charge of mobbing and rioting expired when the officers had executed the warrant. The mob met to prevent the officers from carrying out the warrant, and with the withdrawal of the officers the charge of mobbing ended. I therefore think that the two charges were separate. On the other matter I have no doubt whatever.

The following were the Interlocutors :—

*Edinburgh, 25th October 1882.*—Having considered this Bill, and heard counsel for the parties, Refuse the Bill, and decern : Further, grant warrant to all proper officers of law in possession of this warrant, or an extract thereof, to apprehend the complainer, Andrew Mackenzie, and convey him to and imprison him in the prison of Dingwall, therein to remain during the unexpired period of the sentence pronounced against him in the inferior Court, the said period to run from the date of re-incarceration under this warrant.'

1882. ' *Edinburgh, 25th October 1882.*—Having considered  
 No. 10. this Case, and heard counsel for the parties, answer the  
 Mackenzie and Another questions in the Case in the affirmative, and affirm the  
 v. determination of the inferior Judge, and decern.'

High Court,  
 Oct. 25.

Appeal, also  
 Suspension.

Agent for the Suspendor and Appellant.—W. D. LISTER SHAND, W.S.  
 Agent for the Respondent.—CROWN AGENT.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

DUNCAN MACKAY, JUN., and PATRICK DILLON, Suspenders.—*Watt.*

AGAINST

JAMES PATRICK, Respondent.—*Lang.*

STATUTE 27TH AND 28TH VIC., c. 53, SECS. 14 AND 34 (Summary Procedure Act, 1864)—PLEA OF GUILTY NOT AUTHENTICATED—FORM, WANT OF—CONVICTION—MALICIOUS MISCHIEF—OPPRESSIVE SENTENCE—DESTROYING TREES.—The plea upon which a conviction and sentence pronounced in a Justice of Peace Court on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, not having been authenticated in terms of the 14th section of the Summary Procedure Act, 1864, the accused brought a suspension. They admitted that they had actually tendered the plea, and the conviction bore to proceed 'in respect of the judicial confession of the respondent.' The Court (*dub.* Lord Justice-Clerk) *refused* the bill, being of opinion that, as the accused admitted that they had tendered the plea, the objection resolved itself into an objection to want of form of the class contemplated by section 34 of the Act of 1864.

In a Justice of Peace Court two persons pleaded guilty to the crime of malicious mischief in having destroyed seven trees growing near a high road, the property of a private person. They were each sentenced to thirty days' imprisonment, without the option of fine. Suspension on the ground that the sentence was oppressive *refused.*

No. 11.  
 Mackay  
 and Another  
 v.  
 Patrick.

High Court,  
 Oct. 25.

Susp. & Lib.

DUNCAN MACKAY, jun., apprentice rivetter, and PATRICK DILLON, labourer, both of Greenock, presented this Bill of Suspension and Liberation against a conviction and sentence pronounced by two Justices in the Justice of

Peace Court for the county of Ayr at Largs, upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of the respondent, JAMES PATRICK, Procurator, whereby they, the suspenders, were convicted upon their own confession of malicious mischief by having, on 2d September 1882, broken and destroyed eight young trees in a piece of enclosed ground a few miles east of Largs, and in which they were sentenced to thirty days' imprisonment each with hard labour, without the option of a fine.

1882.  
 No. 11.  
 Mackay  
 and Another  
 v.  
 Patrick.  
 High Court,  
 Oct. 25.  
 Susp. & Lib.

It appeared that the plea tendered to the Justices by the suspenders was in the usual form, partly written and partly printed, but that it was, as they themselves stated, signed by no one. They had not been asked if they were unable to write, and it had not been signed either by one of the Justices who were present or by the Clerk of Court for the suspenders. The conviction and sentence however bore to have been pronounced 'in respect of the judicial confession of the respondents,' and it was admitted that the plea had been tendered.

It was pleaded in the Bill—(1) The complainers are entitled to the suspension and liberation prayed for in respect that the plea was not authenticated either by them, or the Justices or Clerk of Court for them, as required by section 14 of the Summary Procedure (Scotland) Act, 1864 (27th and 28th Vic., c. 53). (2) The said conviction and sentence being unjust and oppressive, ought in the circumstances to be suspended, with expenses.

WATT, for the suspenders.—The enactment in section 14 of the Summary Procedure Act, regarding the authentication of the plea, is imperative. The section says that it 'shall be signed by the respondent, or by a Judge or the Clerk of Court, if the respondent cannot write.' And although the rubric in the case of *Scott v. Morrison*, Jedburgh, Apr. 9, 1872, Couper, vol. ii., p. 218, bears—'Objection, that the plea of guilty was not authenticated by the signature either of the appel-

1882. No. 11. Mackay and Another v. Patrick.  
High Court,  
Oct. 25.  
Susp. & Lib.

lant or of the presiding magistrate, repelled and the appeal dismissed'—that is not in reality an authority in point against our contention for the suspender in this case; for the complaint in that case not having been brought under the Summary Procedure Act, the objection arose there at common law, and not under the enactment in section 14 of the Statute. The absence of a signature is more than a mere matter of form, it might open the door to serious abuses. Further, the sentence was oppressive and out of proportion to the offence, which was simply that of breaking a few trees on an unenclosed piece of ground near the high road.

LANG, for the respondent.—The judgment of the Justices in the conviction and sentence, which proceeded upon and followed *unico contextu* with the plea, was authenticated in the usual way by the signature of the Justices. That was substantially a compliance with the enactment in section 14, and the objection is a purely formal and technical one, and as such excluded by section 34 of the Summary Procedure Act. The violation of the 14th section is not fenced with an irritancy. And 2d, as to the oppressive character of the sentence, the ground was enclosed and the trees were seriously damaged by a number of young men, of whom, as they themselves admit, the suspenders were two. It was not the chance act of the two complainers only, and the Justices knew whether the offence was common in the district.<sup>1</sup>

---

<sup>1</sup> Statute 27th and 28th Vic., c. 53, Summary Procedure (Scotland) Act 1864, section 14—'Where the respondent shall be present at the hearing, the substance of the complaint shall be read to him and he shall thereupon be required to plead in common form,' . . . 'and the respondent's plea shall then' . . . 'be recorded;' 'and the plea, if the same be guilty, shall be signed by the respondent, or by the Judge or the Clerk of the Court if the respondent cannot write,' &c.

Section 34 — 'No conviction or judgment in pursuance of this Act shall be quashed for want of form, and no warrant of imprisonment, or for poinding and sale, and no extract of judgment, shall be

LORD YOUNG.—The only ground of suspension here which requires our consideration is that which relates to the authentication of the plea of guilty. The Statute requires the plea of guilty to be authenticated by the signature of the person tendering the plea if he can write, or, if he cannot write, by that of the Judge or the Clerk of Court. We are here told that one of the complainers can, and that the other cannot write. However that may be, the plea is certainly not authenticated by the signature of anyone in the usual place; but following the plea and on the next page comes the conviction, which bears to be ‘in respect of the judicial confession of the respondents.’ Now, there has undoubtedly been an oversight here. In order properly to satisfy the very reasonable provision of the Statute in this matter, the plea itself should have had the signature of some one attached to it. But in the present case it is nothing more than an oversight. The complainers come here admitting that there was a plea of guilty; and, taking their stand on the merely technical ground of the omission of any signature to the plea as recorded, they say that it is sufficient to upset the whole proceedings. I have come to the conclusion that they have not shewn sufficient ground to entitle us to do that. I have come to this opinion not without difficulty, for we do look somewhat critically in this Court at matters of form, especially at matters of substantial form, of which I cannot say that the present is not an instance. If there had been any doubt as to the fact of the plea of guilty having been tendered and accepted, or, if there had been any other matter of controversy of that kind, it would have been difficult to resist the conclusion that the omission of the signature was sufficient to vitiate the conviction.

1882.

No. 11.  
Mackay  
and Another  
v.  
Patrick.

High Court,  
Oct. 25.

Susp. & Lib.

---

held void by reason of any defect of form therein, provided it be therein mentioned or may be inferred therefrom that it is founded or has proceeded as a conviction or judgment, and there be a valid conviction or judgment to sustain the same.’

1882. But not only is the plea referred to in the conviction by  
 No. 11. the Justices, it is also on the records of their Court that  
 Mackay such a plea was given, and there is no dispute at all  
 and Another about the fact. Now, I am of opinion that the Sum-  
 Patrick. mary Procedure Act is intended to protect the proceed-  
 High Court, ings of inferior Judges from any miscarriage of justice  
 Oct. 25. on technical grounds; and as it appears to me that  
 Susp. & Lib. the provisions of the Statute have been substantially  
 attended to here, and that no injustice has been done, I  
 think that we ought not to set aside this conviction.  
 As I have said, that is the only point which in my  
 opinion merits our consideration. For although a sen-  
 • tence of thirty days' imprisonment may be a severe sen-  
 tence, yet that is a matter for the Magistrates to consider.  
 I say 'may be a severe sentence,' for the Magistrates  
 know the whole circumstances of the case. They know  
 the district, and whether it is a prevalent evil there that  
 troops of young men should go about destroying trees.  
 If it is, I must say that I cannot consider the sentence a  
 severe one.

LORD CRAIGHILL.—I have come to the same conclu-  
 sion. I must say I have never felt any difficulty as to  
 the alleged oppressive character of the sentence. It is  
 no doubt a hard sentence, but nothing has been said to  
 suggest to my mind that it is too hard a sentence.  
 On the other question, that relating to the authenti-  
 cation of the plea of guilty, I have had considerable  
 difficulty, but in the end I have come to think that this  
 case is one of those provided for by the 34th section of  
 the Summary Procedure Act. The question comes to  
 be truly one of form, seeing that the plea was actually  
 tendered, and sentence in respect of that plea was  
 pronounced.

LORD JUSTICE-CLERK.—I have had great difficulty.  
 Your Lordships have decided the case, and therefore I  
 do not express my opinion. But I must own that I  
 should have reached that result with very great diffi-  
 culty. The Clerks of Court must take care that these

matters are attended to. There is no reason for neglect of them, as the provisions of the Statute are plain. 1882.

The following was the Interlocutor :—

‘*Edinburgh, 25th October 1882.*—Having considered this Bill, and heard counsel for the parties, Refuse the bill, and decern.’

No. 11.  
Mackay  
and Another  
v.  
Patrick.

High Court  
Oct. 25.

Susp. & Lib.

Agents for the Suspenders—Messrs CUTHBERT & MARCHBANK, S.S.C.

Agents for the Respondent—Messrs HOPE, MANN, & KIRK, W.S.

Present,

THE LORD JUSTICE CLERK.

LORDS YOUNG and CRAIGHILL.

JAMES ALLISON, Appellant.—*Dickson.*

AGAINST

SARAH JANE PIGOTT OR BALMAIN, Respondent.—*Orr.*

**TRADES UNION, UNREGISTERED—JURISDICTION UNDER SMALL-DEBT ACT—JURISDICTION OF SHERIFF—STATUTE 1 VIC., c. 41, SEC. 31 (Small-Debt Act)—TRADE, RESTRAINT OF—COURT OF JUSTICIARY—EXPENSES.**—The widow of a member of a trade society raised a small-debt action against the society for payment of £12, as the funeral allowance due to her as widow. The society pleaded that the Sheriff had no jurisdiction, in respect that the society was an unregistered trades union, some of the purposes of which were in restraint of trade ; that the action, as being an action to enforce an agreement to provide benefits to the members of the society out of its funds, was incompetent at common law, also under section 4 of the Trades Union Act, 1871, which enacts that ‘nothing in this Act shall enable any Court to entertain legal proceedings instituted with the object of directly enforcing’ ‘any agreement for the application of the funds of a trades union (a) to provide benefits to members.’ The Sheriff granted decree against the defenders, who appealed to the Court of Justiciary under the 31st section of the Small-Debt Act, 1837. The respondent objected to the competency of the appeal. The society replied that, as the Sheriff had erroneously sustained his own jurisdiction, and determined the merits of an action which was competent in no Court, an appeal against his decree was competent.

*Held* that the question whether, under the Acts of Parliament and the rules of the society, a contract enforceable in a Court of law had been entered into between the deceased member and the society,



1882.  
 —  
 No. 12.  
 Allison  
 v.  
 Balmain.  
 —  
 High Court,  
 Oct. 25.  
 —  
 Appeal

was a question which the Sheriff was entitled to determine, and that his judgment finding that there was such a contract was not appealable under the Small-Debt Act.

In an appeal to the Court of Justiciary under the 31st section of the Small-Debt Act, 1837, which raised an ordinary question of civil liability between private persons, the Court, instead of following their usual practice of modifying the expenses of the successful party at a fixed sum, remitted the account of expenses to the Clerk of Court to tax and report, and thereafter approved of the report, and decerned for the amount as taxed.

This was an appeal which was certified to the High Court by Lord Mure from the Circuit Court held at Glasgow on 24th August 1882, in respect of the general importance of the question raised. The appellant, JAMES ALLISON, the Secretary of the Glasgow Branch of the Amalgamated Society of Engineers, Machinists, &c., was sued in May 1882, as representing the society, before the Sheriff Small-Debt Court at Glasgow, by the respondent, Mrs SARAH ANN PIGOTT or BALMAIN, Cowlairs, Glasgow, widow of the late David Balmain, who was a member of said society, for £12 of funeral allowance due to her as widow of the said David Balmain on the death of her said husband, as per statement of claim dated 2nd December 1881, annexed to the summons, in the following terms:—‘To amount of funeral allowance due to me as widow of David Balmain, 19 Helensvale Row Cowlairs, Glasgow, by the said defender on the death of my husband, in terms of Rule 26 of the defender’s Society, £12.’ Allison, the present appellant, appeared as defender before the Small-Debt Court at Glasgow (W. L. Mair, Advocate, Sheriff-Substitute) on 31st May 1882, and declined the jurisdiction of said Court on second and third grounds after stated of this appeal, and decree was pronounced on 7th June thereafter the sum of £10, 18s. 3d. sterling, being the sum concluded for, less £1, 1s. 9d. admittedly due to the society by pursuer’s husband at the date of his death, with 1 expenses.

The appeal to the Circuit Court was present

Allison under the 31st section of the Small-Debt Act, 1837 (1 Vic., c. 41), and upon the following grounds:—

*First*, that the said summons or complaint before the Sheriff of the County of Lanark was incompetent, and ought to have been dismissed, in respect that the Sheriff had no power or jurisdiction to pronounce any judgment or decree in said summons or complaint against the appellant.<sup>1</sup>

*Second*. That the said judgment or decree was incompetently pronounced, in respect said Amalgamated Society of Engineers, Machinists, Millwrights, Smiths, and Boilermakers is an unregistered trades union, the purposes of which, or at least some of them, are in restraint of trade.<sup>1</sup> And the Court cannot competently entertain any legal proceedings instituted with the object of directly enforcing any agreement for the application of the funds of a trades union to provide benefits to its members.<sup>2</sup>

1882.

No. 12.

Allison

v.

Balmain.

High Court,

Oct. 25.

Appeal.

<sup>1</sup> Statute 1st Vic., c. 41 (Small-Debt Act, 1837), section 31. 'It shall be competent to any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary . . . : Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactment as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff,' &c.

<sup>2</sup> Statute 34th and 35th Vic., c. 31 (Trade Union Act, 1871), section 4. 'Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—1. Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. 2. Any agreement for the payment by any person of any subscription or penalty to a trade union. 3. Any agreement for the application of the funds of a trade union—(a) To provide benefits to members; or (b) To furnish contributions to any employer or workman not a member of such trade union, in consider-

1882.

No. 12.  
Allison  
v.  
Balmain.

High Court,  
Oct. 25.

Appeal.

*Third.* That the said summons or complaint was incompetent, and the jurisdiction of the Court was excluded from adjudicating upon the respondent's claim therein made, in respect that the dispute in regard to said claim must by the rules of the society be decided by the councils therein specified.

*Fourth,* That the said summons or complaint was inept and incompetent, in respect the same was directed against the appellant, who does not in law represent the society or any of the branches thereof, and is not liable to be sued therefor.

DICKSON, for the appellant.—We contend that the jurisdiction of the Sheriff in the Small Debt-Court was excluded in respect (1) that by the rules of the society each member became bound, in terms of the form of application made by him to become a member of the society, to conform to the rules, and these rules provide that all disputes regarding benefits and others must be decided by the councils of the society, whose determination shall be final. The respondent was therefore debarred from appealing to any other than the domestic tribunal so provided. Further, even if the action had been competent in a Court of law the society was not properly cited. The summons by being improperly and incompetently presented against the appellant, who is the secretary of the Glasgow branch of the society, was not well laid. The society is not incorporated, and was not in any way represented by the appellant. The rules of the society are silent upon the subject of the office-bearers suing or being sued, and the secretary has not, in terms thereof, anything to do in the way of holding the funds

---

ation of such employer or workman acting in conformity with the rules or resolutions of such trade union ; or c To discharge any fine imposed upon any person by sentence of a Court of justice ; or 4. Any agreement made between one trade union and another ; or 5. Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.'

of the society. The president, vice-president, secretary, and treasurer of the Glasgow branch of the society ought to have been called as defenders.

THE LORD-JUSTICE CLERK.—Then do you admit that if they had been called the action would have been a good one against the society?

DICKSON, for the appellant.—I think they would have been the proper defenders. *Manners v. Fairholme and others*, March 5, 1872, x. Macph., 520; *M'Kernan v. Greenock Lodge of the United Operative Masons' Association of Scotland*, March 19, 1873, xi. Macph., 548, and Feb. 6, 1874, i. Rettie, 453; *Shanks v. The same Defenders*, March 11, 1874, i. Rettie, 823; *Amalgamated Society of Railway Servants for Scotland v. The Motherwell Branch of the Society*, June 4, 1880, vii. Rettie, 867, 34th and 35th Vic., c. 31, secs. 3, 4, and 23, and 39th and 40th Vic., c. 22, sec. 16.

THE LORD JUSTICE-CLERK.—Unless we hold that the society is here we cannot enter upon the more important question raised.

DICKSON, for the appellant,—Our next contention is, and we quote these cases in support of it also, that looking to the rules of this association the society was clearly a trade union for regulating the relations between the workmen themselves, and imposing restrictions upon trade; and it was also an unregistered trade union, and consequently the action both at common law and under statute was incompetent. At common law it was illegal to the effect of being even criminal: and although the criminal element has been removed by 6 Geo. IV. cap. 129, secs. 3 and 4 (1825), 34th Vic., cap. 31, secs. 3 and 4 (1871), and 39th and 40th Vic., cap. 22 (1876), it is still, in terms of secs. 3 and 4 of the Act of 1871, a trade union, and being such, this question is excluded from any Court of law. The latter section provides that no Court of law can entertain any legal proceeding instituted with the object of enforcing an agreement for the application of the funds of such a society to provide

1882.

No. 12.  
Allisonv.  
Balmain.High Court,  
Oct. 25.

Appeal.

1882. benefits to members, which was the nature of the claim  
 No. 12. in the action before the Small-Debt Court.

Allison  
 v.  
 Balmain.] LORD YOUNG.—That is just another preliminary and  
 High Court, purely technical objection. Is there any more honest  
 Oct. 25. defence behind these objections?

Appeal.

DICKSON for the appellant.—Our defence to this claim is, that the pursuer's husband was so far in arrear that by the rules of the society he was excluded from its benefits. He was one pound one shilling and ninepence in arrear, and by Rule 26 it is provided—‘On the death of a free member of the society, if not more than 16s. in arrear, the treasurer shall pay or cause to be paid to his widow,’ &c., ‘on production of a stamped receipt, the sum of £12, to defray his funeral expenses; his arrears and all moneys owing (if any) shall be deducted.’ We contend that in terms of section 31 of the Small Debt Act (1 Vic. c. 41, see foot-note, p. 139), we have a right of appeal on the ground of incompetency, including defect of jurisdiction, and that this was a case of the kind which the Small-Debt Act contemplated in giving to the person aggrieved an appeal on that ground.

LORD YOUNG.—In what Court could an action concluding for £12 be more competently presented.

DICKSON for the appellant.—The Sheriff in the Small-Debt Court is perhaps a competent judge to decide the question as to the competency of the action, but upon that question he is not, in terms of that Act, final. We may appeal against the incompetent judgment of a competent judge. We may therefore plead, and are, we contend, entitled under that Act to appeal and plead that there was here defect of jurisdiction in the Small-Debt Court, because the sum concluded for being a sum of benefit money due by a trades union, the purpose of which are in restraint of trade, any agreement for the payment of said sum cannot, in terms of the Trades Union Acts 1871 and 1876, be enforced in a Court of law, and an action for the purpose of enforcing the same being incompetent, there was, we contend, here no jurisdiction.

Counsel for the respondent was not called upon.

LORD YOUNG.—I am of opinion that this appeal is incompetent. This is a statutory question, and of course we must judge of it, and we are competent to do so, though the question is in another sense one of competency; indeed, there is no other tribunal to judge of it. The Statute says that an appeal against the judgment of the Sheriff in the Small-Debt Court ‘shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff.’ The competency of the appeal is rested on these last words, ‘incompetency, including defect of jurisdiction of the Sheriff.’ Now, the action bears to be upon a contract between the pursuer and the defender, or rather between the deceased husband of the pursuer and the defender, who is the secretary of the Glasgow branch of the Amalgamated Society of Engineers, and the question which the Sheriff was asked to determine was, whether, looking to the position of the parties, and to the contract itself, the defender was indebted to the pursuer, the widow of one of the parties to the contract, in the sum of £12? The pursuer desired to have that question determined by a Court of law in this country, and I put the question more than once in the course of the debate, to what tribunal could she go except to the Sheriff in the Small-Debt Court? The answer given was that the question could be raised in no other Court. The question, I suppose, was raised by summons in a competent manner before the Sheriff. Was there any incompetency then in the proceedings before him? None whatever. The parties addressed themselves to the question whether, looking to the rules of the society, and to the whole circumstances, the one party was or was not indebted to the other in the sum of £12. The Sheriff heard all the

1882.

No. 12.

Allison

v.

Balmain.

High Court.

Oct. 25.

Appeal.

1882.  
 No. 12.  
 Allison  
 v.  
 Balmain.  
 High Court,  
 Oct. 25.  
 Appeal.

statements of parties, and decided honestly, and to the best of his ability, the merits of this particular case in favour of the pursuer. I am of opinion that there was no incompetency, including or not including defect of jurisdiction. The Sheriff was the only Judge having jurisdiction, and the whole proceedings were competently brought before him, and competently determined by him. All that is said by the appellant is that he took a wrong view of the law governing the facts of the particular case. He may or may not have taken an erroneous view of the law, but it was for him to consider the law applicable to these facts, and to pronounce his judgment upon them, and for him only. There the Legislature says the matter must end. I think the incompetency which the Small-Debt Act points to is of another character altogether. I have come to be of opinion, without much difficulty, and without entering on the other questions raised, that the appeal should be dismissed.

LORD CRAIGHILL.—I am of the same opinion. What lies at the bottom of the argument of the appellant is, that the present claim cannot competently be brought before any Court. But that question must be determined somewhere, and the sum sued for being £12, the action could only be brought before the Sheriff sitting in the Small-Debt Court. He was therefore a competent and the only competent, Judge to decide the matter. No question was raised as to the competency of the process. The only question was, whether a particular society was entitled under its rules to contract with its members. That is not a question of competency. It is simply a question as to whether or not the pursuer has a ground of action. The Sheriff-Substitute has determined that she had, and his determination may not, think, be made matter of appeal.

LORD JUSTICE-CLERK.—I concur, and without difficulty. The questions raised are important, and depend upon distinctions requiring to be considered carefully. The ground of the appeal is that the Sheriff-Substitute



went wrong in entertaining the action, because it is said that the society is a trades union, some of the purposes of which are in restraint of trade, and no contract with such a trades union, to provide a benefit to its members, can be made the subject of an action in a civil Court. And the appellant comes here under the clause of the Small-Debt Act which allows appeals only in certain specified cases, one of which is 'incompetency, including defect of jurisdiction.'

1882.

No. 12.  
Allisonv.  
Balmain.High Court,  
Oct. 25.

Appeal.

Now, on the general question, whether this is a trades union, the purposes of which are in restraint of trade in terms of the Statutes, and whether agreements between it and its members can be enforced in a Court of law, I give no opinion. As regards the general rules applicable to such societies, some questions at all events have been determined, and, as I think, quite conclusively determined. But I think that the Sheriff was entitled to decide upon the facts of this particular case whether the contract was or was not cognisable by him. I do not think that there is any objection to his jurisdiction, nor do I understand that it was so pleaded by the appellants. They did not maintain that there was any other tribunal to which the pursuer might have resorted with her claim. What they maintained was that the action was incompetent before the Sheriff-Substitute or anyone else, and that we are entitled to review the judgment of the Sheriff-Substitute because he had determined a matter which was not cognisable by any Court of law. Now, I think that there is no incompetency whatever in the Sheriff-Substitute's judgment. The decision turned entirely upon the question whether or not the pursuer and defender had entered into the obligations of a civil contract. The Sheriff-Substitute decided that there was a civil contract. It was within his power so to determine this, which forms the merits of the case, in a competent process, which it is not disputed the present action is, and under the Small-Debt Act we have no power to

1882. review his determination. Your Lordships therefore  
 No. 12. dismiss the appeal.  
 Allison

"  
 Balmain.

High Court,  
 Oct. 25.

Appeal.

ORR for the respondent moved for expenses, and argued that, as the action was simply an ordinary civil proceeding between private parties, though under Statute the appeal was directed to be taken to the Court of Justiciary, there was no reason why an account of expenses should not be lodged, and remitted for taxation, as in an appeal to the Court of Session.

DICKSON for the appellant contended that the expenses should be modified as in other cases before the Court of Justiciary.

The Court, being of opinion that the action was an ordinary action for civil debt, in which the pursuer had been throughout successful, pronounced the following Interlocutors :—

‘*Edinburgh, 25th October 1882.*—Having considered this appeal, and heard counsel for the parties, dismiss the appeal, and on the respondent’s motion for expenses, before answer, appoint the respondent to lodge an account of her expenses in the hands of the Clerk of Court.’

‘*Edinburgh, 6th December 1882.*—Remit the account of expenses lodged for the respondent to the Clerk of Court to tax and report.’

‘*Edinburgh, 23d December 1882.*—Having heard counsel on the report of the Auditor, find the respondent entitled to expenses: Approve of the Auditor’s report: Modify the expenses to £28, 8s. 10d. stg., for which, and one guinea as the dues of extract, decern against the appellant.’

Agents for the Appellant.—J. & J. GALLETLY, S.S.C.

Agent for the Respondent.—R. EMSLIE, S.S.C.

Present,

The LORD JUSTICE CLERK.

LORDS YOUNG AND CRAIGHILL.

JOHN RITCHIE, Suspender.—*Solicitor-General (Asher) and Brand.*

AGAINST

DONALD M'PHEE, Respondent.—*Lang.*

SUSPENSION—COMPLAINT—RIOTOUS AND DISORDERLY CONDUCT—SPECIFICATION OF OFFENCE—STATUTE 29TH AND 30TH VIC., C. CCLXXIII., SEC. 135, SUB-SEC. 5 (Glasgow Police Act, 1866)—SHOUTING.—The Glasgow Police Act, 1866, section 135, sub-section 5, imposes a penalty upon 'every person who is riotous, disorderly, or indecent in his behaviour.' A conviction and sentence pronounced in the Glasgow Police Court upon a complaint which charged a contravention of this section, in so far as the respondent, of the date and at the place libelled, was 'riotous and disorderly in his behaviour, by shouting aloud, by all which, or part thereof, a noise and disturbance was created, and a large crowd assembled, and the lieges were annoyed,' suspended in respect that from want of specification of the circumstances in the complaint there was not set forth an offence under the Statute.

THIS was a Bill at the instance of JOHN RITCHIE, joiner, Glasgow, to obtain suspension of a conviction and liberation from a sentence of thirty days' imprisonment, without the option of a fine, pronounced against him in the Western Police Court, Glasgow, upon a summary complaint at the instance of DONALD M'PHEE, Procurator-Fiscal of Court, which charged a contravention of the Glasgow Police Act, 1866, section 135, sub-section 5, 'In so far as he had, on 18th September 1882, or about that time, in or near Dumbarton Road and Kent Road, Glasgow, been riotous and disorderly in his behaviour, by shouting aloud, by all which, or part thereof, a noise and disturbance was created, and a large crowd assembled, and the lieges were annoyed.'

BRAND, for the suspender, pleaded.—The complaint is incompetent and irrelevant; it does not set forth an offence at common law or under the Statute. The

1882.

No. 13.  
Ritchie  
v.  
M'Phee.

High Court,  
Oct. 25.

Susp. & Lib

1882.  
 No. 13.  
 Ritchie  
 v.  
 M'Phee.  
 High Court,  
 Oct. 25.  
 Susp. & Lib.

suspender was out on strike, and the allegation is that while some non-union joiners were on their way home under the protection of the police, the suspender shouted at them. All that is set forth in the complaint is that he shouted aloud, 'by all which, or part thereof, a noise and disturbance was created,' &c. It is not said that he was riotous and disorderly in his behaviour otherwise than by shouting aloud. It is not said what it was that he shouted, or how many times, or that he shouted long. He may have made a noise only, or ejaculated merely. Nor is it said that he collected a crowd; all that is said is that a large crowd assembled. The complaint ought at least, we contend, to have set forth the words used in *Clark v. Lang*, Glasgow, May 10, 1876, Couper, vol. iii., p. 268; *Marr v. M'Arthur*, High Court, March 29, 1878, Couper, vol. iv., p. 53; *Wemyss v. Black*, High Court, March 19, 1881, Couper, vol. iv., p. 41. Further, upon the competency, if there be no offence under the Statute set forth, the clauses therein limiting review to the Glasgow Circuit Court are inapplicable, and this Bill is competent.

LANG, for the respondent.—It is difficult to see how the charge could be otherwise libelled, if it be a police offence to make a noise on the public street, and collect a crowd, to the annoyance of the people. It is sufficiently set forth that the suspender was shouting in a riotous and disorderly manner, creating a noise and disturbance and causing a large crowd to assemble. That goes far beyond the mere statement that a noise was made. The fact, also, that the offence is alleged to have been committed in two streets shows that the disturbance has been persisted in. But further, sections 131 and 132 of the Glasgow Police Act, 1866, limit review of all orders or sentences made in pursuance of that Act to the Glasgow Circuit Court on certain grounds, and by way of appeal. This Bill is therefore incompetent.

The LORD JUSTICE-CLERK.—The ground of suspension here is that there is not set forth in this complaint a

criminal offence either under the police Statute or otherwise. I do not for a moment mean to say that shouting aloud in the streets, and so causing a crowd to collect, may not be a very serious police offence, but that should clearly appear upon the narrative of the complaint. Shouting may be innocent or not, according to circumstances, and the circumstances that make it not innocent must appear on the face of the complaint, on the simple and ordinary rule that a man is entitled to know of what he is accused. The words in this complaint do not say what the man did in the way of shouting—whether it was continuous shouting, whether it was loud shouting, whether he had any excuse for what he was doing, or whether he refused to desist when appealed to. These are the things that enter into the nature of the offence, and convert the comparatively innocent act of shouting in the streets once or twice into a serious offence, by being repeated deliberately and intentionally to create a disturbance. There is not a semblance of that on the face of this complaint. What the real state of the facts may be I do not know, but I think this conviction cannot be sustained, because the complaint does not charge the complainer with any specific offence.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor :—

‘ *Edinburgh, 25th October 1882.*—Having considered this Bill, and heard counsel for the parties, pass the Bill, suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the respondent.

Agents for the Suspenders—Messrs J. & J. GALLETLY, S.S.C.  
Agents for the Respondent—Messrs CAMPBELL & SMITH, S.S.C

1882.

No. 13.  
Ritchie  
v.  
M'Phee.

High Court,  
Oct. 25.

Susp. & Lib.

Present,

THE LORD-JUSTICE CLERK.

LORDS YOUNG and CRAIGHILL.

ANDREW GEMMELL, Appellant.—*M. Kechnie.*

AGAINST

WILLIAM FLECK, Respondent.—*Dean of Faculty (Macdonald)—Shaw.*

HOTEL—KEEPING OPEN HOUSE—STATUTE 25TH AND 26TH VIC., CAP. XXXV. (Public-Houses Acts Amendment (Scotland) Act 1862)—HOTEL, *bona-fide* LODGER IN:—An hotel-keeper who permitted two *bona-fide* lodgers in his hotel to entertain after eleven o'clock at night two friends who lived in the vicinity with exciseable liquors, the same being supplied before eleven, was acquitted upon a charge, under the Public-Houses Act Amendment (Scotland) Act, 1862, of keeping open house after eleven o'clock at night, at the instance of the Procurator-Fiscal, and the latter appealed. Appeal dismissed, with costs, and observed that the case differed from the case where it is proved that lodgings were taken in the hotel to enable exciseable liquors to be obtained during prohibited hours.

1882.

No. 14.  
Gemmell  
v.  
Fleck.

High Court,  
Oct. 27.

Appeal.

THIS was an appeal at the instance of ANDREW GEMMELL, Procurator-Fiscal in the Justice of Peace Court for the county of Haddington, against a judgment of acquittal by the Justices of said county, upon a complaint at his instance as Procurator-Fiscal against WILLIAM FLECK, hotel-keeper, Royal Hotel, North Berwick, which charged a contravention of the Public House Acts Amendment (Scotland) Act, 1862, and the Acts therein recited, by keeping open house after 11 o'clock at night and before 8 o'clock of the morning of the dates libelled. It appeared from the facts stated in the Case that two police-constables entered the respondent's hotel after it had been closed at eleven o'clock on the date libelled, and found two *bona-fide* lodgers in the hotel entertaining with exciseable liquors two friends who were residents at North Berwick, and that it was proved that the liquors had been supplied before eleven o'clock. The question in the Case was:—

‘Whether, in the circumstances above stated, and no liquors having been supplied after 11 P.M. of 4th July 1882, the respondent was guilty of a contravention of his certificate in allowing’ A. and B., ‘the guests of’ C. and D., ‘lodgers in said hotel, to remain and consume liquors in the room engaged by the latter, being part of said licensed premises, after 11 o’clock of the evening of 4th July, and before 8 o’clock of the morning of Wednesday, 5th July, and in particular between the hours of half-past 12 o’clock and 2 o’clock of the morning of said 5th day of July 1882, these gentlemen not being lodgers in said hotel, or *bona-fide* travellers?’

M’KECHNIE, for the appellant, contended—In terms of the Statute libelled, an hotel-keeper is bound not to permit or suffer drinking upon his premises during prohibited hours. The only persons excepted from the operation of the enactment are travellers and persons staying in the house as lodgers. As the persons who were entertained on this occasion were neither, the Justices ought, it is submitted, to have convicted.

THE LORD JUSTICE-CLERK.—Suppose we thought so, what would be the result now. The Justices could not convict him.

M’KECHNIE, for the appellant.—The question is one of importance, and the Fiscal is entitled to ask the opinion of the Court for his guidance. Any person by taking a room in an hotel might obtain exciseable liquors at any time for himself and friends.

LORD CRAIGHILL. — The case of a person taking rooms for the purpose of obtaining drink during prohibited hours is quite a different case. There is no reason to suppose that the present was not a case of *bona-fide* lodgers in an hotel entertaining their friends.

The Court unanimously refused to sustain the appeal, and the following Interlocutor was pronounced:—

‘*Edinburgh, 27th October 1882.*—Having considered this Case, and heard counsel for the parties, Dismiss the appeal: Affirm the determination of the Justices: Find

1882.

No. 14.  
Gemmell  
v.  
Fleck.

High Court,  
Oct. 27.

Appeal.



1882.

No. 14.  
Gemmell  
v.  
Fleck.

High Court,  
Oct. 27.

Appeal.

the respondent entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the appellant.

Agent for the Appellant—H. CORNILLON, S.S.C.

Agent for the Respondent—WM. B. GLEN, S.S.C.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ROBERT CAMPBELL, Appellant.—*Dean of Faculty (Macdonald) and Brand.*

AGAINST

JAMES AULD, Respondent.—*Mackay and M'Kechnie.*

NUISANCE FROM SMOKE—STATUTE 20TH AND 21ST VIC., c. 73, SECTIONS 1 AND 14 (Smoke Nuisance (Scotland) Abatement Act, 1857)—STATUTE 28TH AND 29TH VIC., c. 102, SECTION 1 (Smoke Nuisance (Scotland) Acts Amendment Act, 1865)—STATUTE 40TH AND 41ST VIC., c. CXIII., SECTION 250 (Greenock Police Act, 1877)—HARBOUR—BURGH—RIVER—JURISDICTION.—The Smoke Nuisance (Scotland) Abatement Act, 1857, imposes certain penalties on the use of furnaces not constructed to consume their own smoke, 'employed in the working of engines by steam, whether locomotive or otherwise, in any place to which this Act shall apply, or on board of any steam vessel stopping at or in any such place, or in or at any port, pier, landing place, or harbour within the same, or when plying upon any part of a river which, at such part, shall not exceed a quarter of a mile in breadth,' or on the negligent use of such furnaces when properly constructed. The 14th section of the same Act, with reference to royal burghs, declares that the word 'place' shall include the whole area contained within the parliamentary or police limits of the burgh, and the Smoke Nuisances (Scotland) Acts Amendment Act, 1865, extends this definition to other burghs. Held that an offence could not be committed on board a vessel sailing in a part of a river more than a quarter of a mile broad, although within the parliamentary or police limits of a burgh to which the Act applied.

No. 15.  
Campbell  
v.  
Auld.

High Court,  
Oct. 27.

Appeal.

THIS was an Appeal at the instance of ROBERT CAMPBELL, steamboat owner in Glasgow, against a conviction and sentence pronounced in the Greenock Police Court, upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, the Acts 20th and

21st Vic., c. 73 [The Smoke Nuisance (Scotland) Abatement Act, 1857], 24th Vic., c. 17 [(1861) amending said Smoke Act, 1857], and the 28th and 29th Vic., c. 102 (1865), amending both of said previous Smoke Acts, at the instance of JAMES AULD, Procurator-Fiscal, which set forth, That the appellant and Archibald M'Pherson, master of the steam vessel *Vivid* of Glasgow, have both and each or one or other of them been guilty of an offence against sections 1 and 2 of the Act 20th and 21st Vic., c. 73, entitled 'An Act for the Abatement of the Nuisance arising from the Smoke of Furnaces in Scotland,' actors, or actor, or art and part,

'IN SO FAR AS, on the 12th day of June 1882 years, or about that time, the said accused Robert Campbell, being the owner, or one of the owners, of the steam vessel *Vivid*, a river steamer plying on the River Clyde, and the said Archibald M'Pherson being the master of the said steam vessel, there was or were one or more furnace or furnaces employed in said steam vessel in the working of engines by steam, and the said accused, betwixt the hours of five and six o'clock in the afternoon of said day, *while the said steam vessel was stopping at the landing place known as Princes Pier, and also while said steam vessel was sailing on the said river between Princes Pier and Fort Matilda, all within the limits of the town of Greenock, and within your honour's jurisdiction*, did, both and each or one or other of them, use said furnace or furnaces, or one or more of them, notwithstanding that the same was or were not constructed so as to consume or burn its or their own smoke; or whether said furnace or furnaces was or were so constructed or not, the said accused did, both and each or one or other of them, time aforesaid, so negligently use the said furnace or furnaces, or one or more of them, as that the smoke arising therefrom was not effectually consumed or burnt; whereby the said accused have become liable to the penalties set forth in the said statutory enactments. And such offence is the first offence. That this complaint is brought before your honours by virtue of the Greenock Police Act, 1877, section 250.<sup>1</sup>

1882.

---

 No. 15.  
 Campbell  
 v.  
 Auld.

---

 High Court,  
 Oct. 27.

---

 Appeal.

---

<sup>1</sup> Statute 20th and 21st Vic. c. 73, 'Smoke Nuisance (Scotland) Abatement Act, 1857.'

Section 1.—From and after the 1st day of August 1858, every furnace employed in the working of engines by steam, whether locomotive or otherwise, in any place to which this Act shall apply, or on board of any steam-vessel stopping at or in any such place, or in or at any port, pier, landing-place, or harbour within the same, or when plying on any part of a river which

1882.

No. 15.  
Campbell  
v.  
Auld.

High Court,  
Oct. 27.

Appeal.

Prior to the accused being called on to plead before the Magistrate, objection was taken to the complaint

at such part shall not exceed a quarter of a mile in breadth shall in all cases be constructed or altered so as to consume or burn the smoke arising from such furnace; and if any person or company shall, after the 1st day of August 1858, . . . use in such place or on board of any such steam-vessel, any such furnace which shall not be constructed so as to consume or burn its smoke, or shall so negligently use any such furnace as that smoke arising therefrom shall not be effectually consumed or burnt by every person or company so offending . . . being the owner or manager or other person in charge for the time being of any such steam-vessel shall upon a summary conviction for such offence before the Sheriff or Sheriff-Substitute of the county or any two Justices having jurisdiction within the place within which or adjacent to the port, landing-place, river, or harbour in which the offence against this Act is alleged to have been committed, where such place is not a Burgh and where such place is a Burgh then before . . . the Magistrate of such Burgh, forfeit and pay a sum not more than five pounds nor less than forty shillings . . . and shall also pay to the local authority the whole costs incurred in the proceedings for the recovery of such penalty.

Section 14.—In this Act the word ‘place’ shall mean every town or royal Burgh in Scotland, and shall include the whole area contained within the parliamentary or police limits or boundaries thereof, provided the same shall comprehend a population of not less than 2000 and shall also mean and include every Burgh of Barony and Burgh of regality containing a similar amount of population.

Statute 40th and 41st Vic., c. cxcii., (The Greenock Police Act 1877.)

Section 250.—All offences committed within the town against the provisions of the following Acts or any of them, viz., the Act 20th and 21st Vic., c. 73, intituled an Act for the abatement of the nuisance arising from the smoke of furnaces in Scotland, . . . may be tried by the magistrates as police offences under complaint by the procurator-fiscal of the police court, and the penalties may be enforced and applied in the same way as penalties for police offences under this Act.”

Section 5.—The limits of the town of Greenock shall include that part of the river Clyde extending from the shore into the river Clyde for a space of seventeen hundred lineal yards and there turning at a right angle and running north-westward in a straight line to a point in the river opposite to the march between the parishes of Greenock and Inverkip, and then turning at a right angle and running in a south-westerly direction till it reaches the point where the boundary commences.

the ground that under the Act 20th and 21st Vic., cap. 73, the Police Court of Greenock had no jurisdiction, in respect the complaint, as presented to the Court, included a charge of emitting smoke while said vessel was sailing on the river Clyde, and it had not been libelled that the river at the point specified did not exceed a quarter of a mile in breadth, and that as the said charge was cumulative with the charge of emitting smoke while the vessel was stopping at the landing place, the complaint was irrelevant as a whole. The objection was repelled, and thereafter the Magistrate, on the evidence adduced, dismissed the complaint as against the said Archibald M'Pherson, and convicted the appellant Campbell 'of the offence charged alternatively in the complaint, viz., of having on the 12th June 1882, betwixt the hours of five and six o'clock in the afternoon (he being the owner of the steam-vessel *Vivid*, of Glasgow), while said steam-vessel was stopping at the landing-place known as Princes Pier, and also while said steam-vessel was sailing on the river Clyde between Princes Pier and Fort Matilda, all within the limits of the town of Greenock, and within the jurisdiction of the Court, so negligently used the furnace or furnaces on board said steam-vessel, or one or other of them, that the smoke arising therefrom was not effectually consumed or burnt,' and adjudged him to pay a penalty of forty shillings within eight days, with the alternative of three days' imprisonment.

Campbell appealed upon a Case stated under the Summary Prosecutions Appeals Act.

BRAND for the appellant. — The first question is whether the complaint is a competent one under the Smoke Nuisance Abatement Act, 1857. The Greenock Police Act, 1877, did not extend the operation of that Act, and accordingly we have to look to the terms of the Smoke Act in order to see whether the charges in the complaint constitute an offence under it. We contend that, comparing the language of the complaint with the enactment in section 1 of the Statute of 1857,

1882.

---

No. 15.  
Campbell  
v.  
Auld.

---

High Court,  
Oct. 27.

---

Appeal.

---

1882.  
 No. 15.  
 Campbell  
 v.  
 Auld.  
 High Court,  
 Oct. 27.  
 Appeal.

the complaint does not comply with the provisions of that section of the Statute. There would have been a good charge warranting a conviction for an offence committed at Princes Pier, because a pier is one of the places at which the offence may, in terms of that section, be committed; but the complaint charges the emitting of smoke while sailing on the river between Princes Pier and Fort Matilda, as well as at the pier; and the appellant is convicted of the alternative offence in the complaint of having at the date libelled, he being the owner of the vessel while she was stopping at Princes Pier and while she was sailing on the river Clyde between said pier and Fort Matilda, all within the limits of the town of Greenock, and within the jurisdiction of the Court, so negligently used the furnace on board said vessel, as that smoke arising therefrom was not effectually consumed or burnt. And that raises the question, whether it is necessary in a complaint, charging an offence under section 1 of the Smoke Act, as committed upon a river, to set forth and prove that the river at the point in question is not more than a quarter of a mile broad. Our contention is, that it is necessary so to libel and prove; and that admitting that the offence in the section was committed at Princes Pier, the conviction falls to be quashed, because both the complaint and conviction are cumulative, and relate to the commission of the offence at both places, one of which is a point upon a river which was not libelled or proved to be not more than a quarter of a mile broad at the point libelled, in terms of said section 1. (*Reads*, section 1, see foot of page 153.) In point of fact, the river at that point is a great deal more than a quarter of a mile in breadth, and the Smoke Act was never, we contend, intended to be applied to the case of smoke emitted on rivers of such a breadth. And with reference to the words in the complaint and conviction, 'or within the limits of the town of Greenock, and within the jurisdiction of the Magistrates,' we contend that section 250 of the Greenock Police Act, 1877, which

gave jurisdiction to the Magistrates to try all offences committed within the limits of the town against the provisions of *inter alia* the Smoke Act, as police offences, did not extend the operation of the Smoke Act, or render it competent to try as a police offence, when committed upon a part of the river Clyde which happens to be within those limits, that which would not be an offence on any other river more than a quarter of a mile broad, as the river Clyde is at the point in question.

1882.

---

No. 15.  
Campbell  
v.  
Auld.

---

High Court,  
Oct. 27.

---

Appeal.

---

MACKAY and M'KECHNIE, for the respondent.—The question is whether an offence under the Smoke Nuisance Abatement Act, 1857, was committed within the jurisdiction of the Magistrates of Greenock. It is said that the prosecution applied to a place to which the provisions of that Act did not apply; but by section 1 of the Act 28th and 29th Victoria, c. 102 (1865), an Act passed to amend the said Smoke Act of 1857, it is provided that the word 'place' in the Smoke Act shall mean and include every burgh or town of Scotland of a population of not less than 2000, 'and shall include the whole area contained within the parliamentary or police limits or boundaries thereof.' Now, the limits of the town of Greenock are by section 5 of the Greenock Police Act, 1877, defined to include 'that part of the river Clyde extending from the shore on the east of the town into the river for a space of 1700 lineal yards, and there turning at a right angle and running north-westward in a straight line to a point in the river opposite to the march between the parishes of Greenock and Inverkip, and there turning at a right angle and running in a south-west direction till it reaches the point (upon the shore) where the (west) boundary of the town commences'; and that definition includes the part of the river upon which the nuisance was said to have been committed by the *Vivid* on the occasion libelled. And being, therefore, within the Parliamentary limits or boundaries of the Burgh, it is a 'place' in the sense of section 1 of the Smoke Act of 1857, as extended by the amending Act of 1861, to



1882. which the provisions of that section apply, and so *within*  
the jurisdiction of the Magistrates.

No. 15.  
Campbell  
v.  
Auld.

High Court,  
Oct. 27.

Appeal.

LORD YOUNG.—Is it an offence under the Smoke Act to commit a nuisance by the negligent use of a furnace on a river more than a quarter of a mile broad?

MACKAY and M'KECHNIE, for the respondent.—We contend that the operation of the Smoke Act has been extended for police purposes by the subsequent statutes referred to, viz., the 28th and 29th Vic., c. 102, and the Greenock Police Act of 1877, and that the Magistrates have thereby had conferred upon them jurisdiction to try for the offences in the Smoke Act committed at any place within the limits of the town.

LORD YOUNG.—True; but only if an offence under the Smoke Act has been committed.

The LORD JUSTICE-CLERK.—Your contention amounts to this, that what is an offence nowhere else is an offence within the limits of the town of Greenock.

MACKAY and M'KECHNIE, for the respondent.—The appellant has been found guilty of the negligent use of a furnace, and it is admitted that the offence was committed so far as it relates to the pier. The penalty has therefore been incurred. The complaint no doubt says that he committed the offence at one place, and continued to commit it at another, at which other place, it is said, it could not, in terms of the Statute, be committed. But the fact that the offence is said to have been continued after leaving the pier does not, we contend, affect the matter. The offence was admittedly committed, and the addition is mere surplusage.

The LORD JUSTICE-CLERK.—But the sentence is inflicted for the offence committed at both places; and if a person is convicted for what is, along with what is not, an offence, and sentenced for both, as we cannot apportion the penalty the conviction and sentence must go.

MACKAY, for the respondent.—The penalty was incurred by the commission of the offence at the pier, and as there is no injustice, the sentence is, we contend, separable.



The LORD JUSTICE-CLERK.—There has here clearly been a miscarriage, and an unfortunate miscarriage, in the execution of an important Act. The whole matter has proceeded on an assumption which is untenable, namely, that the Greenock Police Act has extended the operation of the Smoke Act of 1857, so as to enable the Greenock magistrates to entertain prosecutions for offences committed on board a vessel sailing on a river, although the river is more than a quarter of a mile broad. That is quite an erroneous view; for if we turn to the Smoke Act we find it distinctly laid down that in the case of offences committed on board a vessel plying on a river, the river must not exceed a quarter of a mile in breadth, and there is nothing in the Police Act which in the least modifies that qualification. Here it is admitted that the river is a great deal more than a quarter of a mile broad, and therefore it is quite plain that no offence has been committed under this provision of the Smoke Act. The conviction, however, applies not only to an offence committed when the vessel was sailing, but also to an offence when she was stopping, and it is said that this second offence, at all events, ought to be allowed to stand. But it is trite law, which has been pronounced over and over again, that if there is a general conviction of two offences, and a single penalty is imposed, and if the conviction for one of the offences is bad, it is impossible that it can stand as regards the other. It is impossible to separate the penalty, and say how much was for the one offence, and how much for the other. I am of opinion, therefore, that we should sustain this appeal.

LORD YOUNG.—I am of the same opinion, and on the same grounds. Indeed, both points seem to me too clear for argument. There was simply a blunder here, as your Lordship has observed. Instead of being confined to the case of smoke emitted at the landing-place, both the complaint and the conviction which followed on the complaint were extended to the case of a vessel sailing on the Clyde, and in respect to this latter the conditions

1882.

---

No. 15.  
Campbell  
v.  
Auld.

---

High Court  
Oct. 27.

---

Appeal.

---

1882.  
 No. 15.  
 Campbell  
 v.  
 Auld.  
 High Court,  
 Oct. 27.  
 Appeal.

imposed by the Statute were overlooked. Now, for the double conviction—one part bad, and the other, I assume good—a single penalty was imposed, and I was surprised to hear an argument advanced—against what I have always regarded as an elementary and well-fixed point of law—that where a conviction is bad in part, and there is one punishment applicable to the whole offence, the entire conviction must fall.

LORD CRAIGHILL concurred.

The following was the Interlocutor:—

‘*Edinburgh, 27th October 1882.*—Having considered this Case, and heard counsel for the parties, reverse the determination of the inferior Judge: Find the appellant entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decree against the respondent.’

Agent for the Appellant.—ADAM SHEILL, S.S.C.

Agents for the Respondent.—DUNCAN, ARCHIBALD, & CUNNINGHAM, W.S.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ROBERT GLASS and JOHN DEMPSTER, Suspenders.—*Guthrie.*

AGAINST

THOMAS LINTON, Respondent.—*Mackintosh.*

SCATTERING SAND UPON STREETS—STATUTE 42ND AND 43RD VIC., CXXXII., SECTIONS 99, 153, AND 309 (Edinburgh Municipal and Police Act)—BYE-LAW—TRAMWAY—CASE ON APPEAL—SUSPENSION—Two persons convicted of a contravention of the byelaw authorised by the Edinburgh Municipal and Police Act, 1879, which prohibited the throwing or scattering any sand or rubbish on any street, & objected in a Bill of Suspension, that the bye-law not being made in accordance with the provisions of the Statute, the conviction was without statutory warrant, and illegal, the objection repelled the proceedings found orderly proceeded with, and the Bill refused. Held also that the suspenders could not be heard to plead that they had acted under the instructions of the Edinburgh Tramway

Company, in whose employment they were, in respect that the fact was not before the Court.

This was a suspension of a conviction and sentence pronounced in the Edinburgh Police Court, by which the following charge, in a complaint at the instance of THOMAS LINTON, the Procurator-Fiscal of Court, was found proved, and the respondents in the complaint, the present suspenders, were sentenced to pay a fine of seven shillings and sixpence, with imprisonment not exceeding three days until paid.

1882.

No. 16.  
Glass and  
Dempster  
v.  
Linton.

High Court,  
Oct. 27.

Suspension.

The complaint set forth that ROBERT GLASS, residing in North Cromwell Street, Leith, and JOHN DEMPSTER, residing in James Street, Pilrig, Edinburgh, have been guilty, actors or actor, or art and part, of an offence against a bye-law, made and enacted by the Magistrates and Council, as authorised by 'The Edinburgh Municipal and Police Act, 1879,' in so far as, upon the 30th day of September 1882 years, or about that time, the said accused did both, and each, or one or other of them, throw or scatter a quantity of sand, or other material, upon the street in Leith Walk, at or near Albert Place, Edinburgh, the said sand, or other material, not being thrown or scattered in time of frost to prevent accident.<sup>1</sup>

<sup>1</sup> The following is the bye-law :—'27. No person shall throw or scatter any sand, rubbish, ashes, or other material on any street or court, except in time of frost to prevent accident.'

Statute 42nd and 43rd Vic., c. cxxxii., 'Edinburgh Municipal and Police Act, 1879.'

Section 309. 'The Magistrates and Council may from time to time make such bye-laws as they think fit for the several purposes after mentioned, provided the same be not repugnant to the law of Scotland, or the provisions of this Act. The first sub-section of section 309 is—'For preventing nuisances and annoyances in any street or court.'

Section 99. 'Every person who shall collect, or authorise the collection of, or shall lay, or cause to be laid down, any rubbish on any street or court, and permit the same to lie for more than six hours, shall be liable to a penalty not exceeding forty shillings, and in the event of such rubbish not being removed within the time above specified, the inspector of cleansing, or other person under his direction, may remove the same at the expense of the person collecting or authorising the collection of, or laying, or causing it to be laid down, and the cost of the removal thereof shall be recoverable from such person by the collector as a debt at common law: Provided always that it shall not be deemed an offence to lay sand or other materials in any street or court in time of frost to prevent accidents, or litter or

1882.  
 No. 16.  
 Glass and  
 Dempster  
 v.  
 Linton.  
 High Court,  
 Oct. 27.  
 Suspension.

It was stated in the Bill that the complainers are employed by the Edinburgh Street Tramways Company. On the date and at the place stated in the complaint they, by means of a patent distributor, designed and used for the purpose, scattered a quantity of sand on the tramway lines. The sand was scattered to prevent an accident, and was essential for that purpose, and in order to carry on the tramway traffic with safety.

And it was pleaded in the Bill—

1. The terms of the said bye-law not being authorised by 'The Edinburgh Municipal and Police Act, 1878' the sentence complained of ought to be suspended.

2. The terms of the said bye-law being repugnant to the law of Scotland, and to the provisions of the Act, the sentence complained of ought to be suspended.

3. In respect that section 153<sup>1</sup> of the said Act exempts the tramways from its provisions, the sentence complained of ought to be suspended.

4. The use of sand being necessary for the working of the traffic, and the said tramways being authorised by the Act of Parliament, the complainers were entitled to scatter sand on the occasion in question, and their conviction ought to be suspended.

5. The said sentence being, in the circumstances, oppressive, descended on, wrongous, illegal, unjust, and oppressive, the same ought to be suspended.

6. The said sentence being suspended, warrant ought to be granted upon the Clerk of Court, or the respondent, to repay to the complainers the said sum of 7s. each, being the sums taken possession of by them for penalties imposed upon the complainers.

The evidence which was taken before the Magistrate

---

other suitable materials to prevent the freezing of water in pipes, in case of sickness to prevent noise, if the person laying any such materials shall cause them to be removed as soon as the occasion for them ceases.

<sup>1</sup> Section 153. 'Nothing in this Act contained shall affect the provisions of the several acts for and relating to the construction and maintenance of tramways and the traffic thereon within the burgh

in the Police Court was printed in the form of an appendix to the Bill, and before allowing counsel for the suspenders to be heard upon the Bill, the Court ordered the appendix to be withdrawn.

1882.

No. 16.  
Glass and  
Dempster  
v.  
Linton.

GUTHRIE, for the suspenders.—The conviction is without statutory authority. The bye-law, the contravention of which is charged, is not in accordance with the provisions of the Edinburgh Municipal and Police Act, 1879. (*Reads the bye-law and the sections quoted above.*) The Act provides that no person shall lay down sand or other material on the streets except in time of frost, or to prevent annoyance to persons in time of sickness, whereas the bye-law provides for the scattering of sand on no other occasion than that of frost. Under it any person who puts down sand on the street in time of sickness would be liable to prosecution and conviction for so doing.

High Court,  
Oct. 27.  
Suspension.

The LORD JUSTICE-CLERK.—The bye-law need not include all the exceptions. It seems to me to be an echo of the Act.

GUTHRIE, for the suspenders.—There are also words made use of in the bye-law which are not in the Act. The bye-law says, 'shall throw or scatter any sand,' &c. The words in the Act are, 'collect or lay down.' Many acts might be said to fall within the bye-law which could not be included within the terms of section 99 of the Statute. The Act was never meant to be applied to the case where a tramway company, for safety, and in the exercise of their traffic, put sand on the rails when going down hill, or on the causeway between the rails coming up hill. It was meant to be applied to the case where a heap of sand or other material was collected or thrown down, as people throw rubbish on the street, to be taken away. The use of sand is an absolute necessity for carrying on the Tramway Company's traffic.

LORD YOUNG.—But the Magistrates may negative that contention.

GUTHRIE, for the suspenders.—The Magistrates cannot

1882.

No. 18.  
Glass and  
Dempster  
v.  
Linton.

High Court,  
Oct. 27.

Suspension.

deal with the question, whether the bye-law is in accordance with the Act. And we contend for the Tramway Company, that where you have a thing given by Act of Parliament, you have everything given which is necessary to carry out that thing: and that by section 153 the tramway traffic is excepted from the operation of the Statute.

LORD YOUNG.—We have no knowledge of the fact stated in the Bill, viz., that these men were in the employment of the Tramway Company, or that the scattering of the sand was done in the course of the employment of the Tramway Company, or for the purpose of assisting their traffic. If these were facts in the Case, which were intended to be founded upon, the suspenders ought to have obtained a Case on appeal stated by the Magistrate. We have not the facts of the case before us. I do not know whether the complainers have been well used or ill used. But upon the face of the complaint and the conviction, I am of opinion that the complaint is relevant and the conviction regular. With reference to the facts of the case, it may be that on a right view of the law these parties ought not to have been convicted. How that may be I cannot tell, as I do not know the facts. The Magistrate is final on the facts, though he is not final in the view he takes of the law. And accordingly the Legislature has provided that where the party convicted, or the prosecutor whose prosecution is dismissed, is of opinion that, regular as the proceedings are upon the face of them, upon the facts of the particular case the conviction or acquittal is based upon an erroneous view of the law, he is entitled to apply to the Judge to state the facts which he holds to be proved; and if the conviction is not good with reference to the law regarding these facts, we will set it aside. This was the course that ought to have been taken by the suspenders.

LORD CRAIGHILL.—I am of the same opinion.

The LORD JUSTICE-CLERK.—I concur, and have nothing to add.

The following was the Interlocutor :—

*‘Edinburgh, 27th October 1882.—Having considered this Bill, and heard counsel for the parties, Refuse the Bill: Find the respondent entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern.’*

1882.

No. 16.  
Glass and  
Dempster  
v.  
Linton

High Court,  
Oct. 27.

Suspension.

Agents for the Suspender—Messrs PATERSON, CAMERON, & Co., S.S.C.

Agent for the Respondent—W. WHITE MILLAR, S.S.C.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ISABELLA MILTON, Appellant—*Brand.*

AGAINST

DONALD M'PHEE—*Lang.*

PROSTITUTES, HARBOURING — STATUTE 29TH AND 30TH VIO., c. CCLXXIII., SECS. 136, 137, and 142 (The Glasgow Police Act, 1866) — SPECIFICATION, WANT OF.—Objection in an appeal under the Summary Prosecutions Appeals Act, to a complaint under sections 137 and 142 of the Glasgow Police Act, 1866, charging the harbouring of prostitutes for the purpose of prostitution, that the charge used the words of the Statute only, and was wanting in specification—repelled.

Objection also, that the fact of one prostitute being found in a house along with the appellant, who was herself a prostitute, did not constitute the offence libelled, also repelled, and the appeal dismissed.

THIS was an appeal at the instance of ISABELLA MILTON, in custody under a warrant granted in pursuance of section 136 of the Glasgow Police Act, 1866, against a conviction and sentence pronounced in the Glasgow Police Court, upon a complaint at the instance of the Procurator-Fiscal of Court, which charged her with having contravened said Act, particularly sections 137 and 142 thereof, actor or art and part :

No. 17.  
Milton  
v.  
M'Phee.

High Court,  
Oct. 27.

Appeal.

IN SO FAR AS, upon the eighteenth day of August current (1882), she, the said Isabella Milton, being the occupier of a building or part of



1882. a building, situated at or near 377 Bath Street, Glasgow, ordinarily  
 No. 17. or shortly before the said 18th day of August current, being the  
 Milton date of entry under the said warrant, used for the purpose of  
 M'Phee. harbouring prostitutes for the purpose of prostitution, did, time and  
 place last above mentioned, keep, manage, use, or knowingly suffer to  
 be used, the said building or part of a building, situated as aforesaid,  
 for the purpose of harbouring prostitutes for the purpose of prostitu-  
 tion, in contravention of the said Act, particularly the sections thereof  
 before specified.

High Court,  
Oct. 27.

Appeal.

There were no preliminary objections taken before the Magistrate, and the charge having been found proved upon evidence adduced, Milton was found liable in a penalty of ten pounds, and appealed upon a Case stated under the Summary Prosecutions Appeals Act.

The facts, as stated by the Magistrate in the Case, were that on the complaint of a neighbour living in the same close, supported by the evidence of the police, the warrant to search the house of the appellant was obtained. That the appellant was a prostitute, and had been previously convicted of keeping a brothel. That she was the occupier of the house in question, which consisted of four rooms and a kitchen. That on the date libelled, when the police, in virtue of the warrant, entered the house, the appellant, another prostitute, and three strange men were found there, one of whom was in a bed in the kitchen, while the others were found, one in each of the beds in a room which the appellant and the other prostitute were seen to leave, almost naked, before the police were admitted ; and on being asked, the men did not deny that they had resorted to the house as a brothel.

The Case further stated that (Article ix.) 'Although no objection was taken at the trial by the appellant (who was not represented at the trial by an agent) 't the description of the search warrant contained in th complaint, she now objects to said description in respec (1) that the complaint alleges that it was granted i pursuance of section 136 of the Glasgow Police Act while a search warrant granted under that section i inapplicable ; (2) that there is no specification of th

alleged prostitutes, said to have been harboured, in the search warrant, complaint, or conviction; (3) that the conviction is inept in respect that the offence charged, although proved, is not a contravention of sections 137 and 142, but exclusively of section 142.'

The questions of law for the opinion of the Court of Justiciary were:—'(1) In the circumstances, does the fact of only one prostitute being found in the house along with the appellant, who is herself a prostitute, constitute the offence complained of? (2) In the event of the foregoing query being answered in the affirmative, the opinion of the Court is also desired by the appellant on the questions raised under the foregoing article No. 9.'<sup>1</sup>

BRAND, for the appellant.—Neither the complaint nor the conviction, which convicts simply 'of the offence libelled,' is sufficiently specific. (*Reads* complaint, also section 142 of 'The Glasgow Police Act, 1866.') The

1882.

No. 17.  
Milton  
v.  
M'Phee.

High Court,  
Oct. 27.

Appeal.

<sup>1</sup> Statute 29 and 30 Vic., c. CCLXXIII., Glasgow Police Act, 1866. Section 136 is directed against unlicensed or improper places of resort, and gives power to the magistrates to grant warrant to enter into any building or part of a building which the magistrate is satisfied there is reasonable ground for believing is kept, managed, or ordinarily used for any of certain specified purposes, of which the purpose of prostitution is *not* one.

Section 137 renders liable in a penalty not exceeding £10 every occupier or proprietor of any building or part of a building kept, managed, or used for any of the purposes mentioned in the previous section.

<sup>2</sup> Section 142 provides—'The provisions hereinbefore contained with respect to entering unlicensed or improper places of resort under a warrant of the magistrates shall apply to any building or part of a building ordinarily or shortly before the date of entry under such warrant used for the purpose of harbouring prostitutes for the purpose of prostitution; and by virtue of such warrant it shall be lawful for any constable to take into custody, and convey to the police office, in order to be brought before the magistrate, the occupier of such building or part of a building, or any person found therein, who either temporarily or permanently manages or assists in the management of the business conducted therein;' who, it is provided, are to be liable in the same penalty as the proprietors and occupiers of unlicensed or improper places of resort.

1882. offence is not so specifically set forth in the Statute as to make it sufficient, in libelling it, to use merely the words of the Statute. Such an offence may be committed in a variety of ways, and the complaint ought to have specified the particular way in which it was intended to be proved that it was committed. The word 'harbouring' is an ambiguous term. Does it mean lodging, or what? Also whether this offence is libelled under The General Police and Improvement (Scotland) Act, or under this local Police Act, it is necessary that the prostitute alleged to have been harboured should be specified; the appellant was entitled to that notice. *Abbott v. Grant* High Court, May 26, 1882, Couper, vol. iv. p. 614. Had this been attempted it would have been found impossible to have framed a relevant averment consistent with the truth; because there being only one prostitute found in the house on the occasion, besides the appellant, and it being impossible relevantly to aver that the appellant had harboured herself, an instance of the offence of harbouring prostitutes would not be set forth. And even if the fact that the appellant was a prostitute were superadded, the purpose of the women being there cannot be assumed from one particular instance of their being found in circumstances of suspicion.

Counsel for the respondent was not called upon.

LORD YOUNG.—I think that there is nothing in this appeal. It is an appeal on a Case stated, which is brought by an appellant who feels aggrieved by what she thinks to be an error in law committed by the Magistrate, and she asks the Magistrate to set forth the facts, to enable us to judge of this real or supposed error in law. Now, I do not think that the facts stated in the Case disclose any error in law at all, and really our jurisdiction ends there. For my own part, I do not see how the Magistrate could well have come to any other conclusion than he did; but that is not the question. It is sufficient for us that he did come to that conclusion, and that the facts which he held to be proved were such

in law entitled him to come to that conclusion. And, 1882.  
as I have already said, I think they were.

As to the objection of want of specification, I must say that I think the complaint is bare enough in that respect; but still there is sufficient specification. And, at all events, this objection was not taken at the trial; and when an objection of this sort is not taken then, but is raised for the first time on a Case stated with reference to some real or supposed error in law by the Magistrate, I do not think that, as a general rule, we ought to go back on the objection.

No. 17.  
Milton  
v.  
M'Phee.  
High Court,  
Oct. 27.  
Appeal.

LORD CRAIGHILL and the LORD JUSTICE-CLERK concurred.

The following was the Interlocutor :—

*'Edinburgh, 27th October 1882.—Having considered this Case, and heard counsel for the parties, dismiss the Appeal: Affirm the determination of the inferior Judge: Find the respondent entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the appellant.'*

Agent for the Appellant—J. LINDSAY, Writer, Glasgow.  
Agents for the Respondent—CAMPBELL & SMITH, S.S.C.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

JOHN COCHRAN, Suspenders.—*Kennedy.*

AGAINST

ARCHIBALD BARCLAY FERGUSON, Respondent.—*M'Kechnie.*

**CONVICTION**, PARTLY ON CONFESSION AND PARTLY ON EVIDENCE —  
**CONVICTION**, NULLITY OF—SUMMARY PROCEDURE ACT, 1864, SEC. 34  
—FORM, OBJECTION TO — CONVICTION, SIGNING — MAGISTRATE,  
**POLICE**—COMPETENCY OF SUSPENSION—STATUTE 25TH AND 26TH  
VIC., c. 101, SEC. 430 (General Police and Improvement (Scotland)  
Act, 1862)—DELAY AND ACQUIESCENCE—MORA.—A conviction  
upon a summary complaint which bore to proceed partly in respect

of the judicial confession of guilt, and partly on the evidence adduced, suspended as radically null, and the bill held competent, notwithstanding the limitation of review in section 430 of the General Police Act of 1862, by virtue of which the conviction had been obtained. Held also that there had been, in the circumstances, no such acquiescence or delay on the part of the accused as to bar him from pleading the nullity.

1882. THIS was a Bill presented by JOHN COCHRAN, Farmer,  
 No. 18. Mains, Dunlop, Ayrshire, for suspension of a conviction  
 Cochran and sentence obtained before the Police Court of the  
 v. burgh of Stewarton, upon a complaint under the Sum-  
 Ferguson. mary Jurisdiction (Scotland) Acts, 1864 and 1881, at the  
 High Court, instance of the respondent, ARCHIBALD BARCLAY FER-  
 Oct. 27. GUSON, the Procurator-Fiscal of said Court, which charged  
 Suspension. breach of the public peace, 'in so far as, upon Monday,  
 the 3d day of July 1882 years, the said John Cochran  
 did, in Rigg Street, Stewarton, in the burgh of Stewarton  
 and county of Ayr, conduct himself in a drunken and  
 disorderly manner, by cursing and swearing, and also by  
 recklessly riding a horse under his charge, to the danger  
 of the lieges, whereby a large crowd of people was  
 collected, and a breach of the public peace was committed;  
 whereby the said John Cochran is liable to forfeit and  
 pay a penalty not exceeding £5; failing immediate pay-  
 ment thereof, to be imprisoned in the prison of Ayr for  
 a period not exceeding *thirty* days.'

The suspender Cochran appeared personally, in terms of the citation upon the complaint, before two of the police Magistrates of the said burgh on 24th July 1882, and upon the diet being called, tendered a plea of guilty to having been 'drunk and swearing, but not guilty to the averment of reckless riding;' but the plea was not accepted, and after evidence had been led, the following conviction and sentence was pronounced:

'STEWARTON, 24th July 1882.—The Magistrates, in respect of the above judicial plea of guilt, and evidence adduced, convict the said John Cochran of the crime charged, and therefore adjudge him to forfeit and pay the sum of penalty, twenty shillings, and in default of immediate payment thereof, adjudge him to be imprisoned in the

prison of Ayr for the period of ten days from the date of his imprisonment, unless the said sum shall be sooner paid, and grant warrant to officers of Court to apprehend him and convey him to the said prison, and to the keeper thereof to receive him and detain him accordingly.—JAMES WYLLIE, *Magistrate*.'

1882.

—  
No. 18.  
Cochran  
v.  
Ferguson.

The suspender immediately paid the fine, and in October following he brought the present Bill, in which it was pleaded, *inter alia*, (4) The said pretended conviction ought to be quashed as incompetent and null.

High Court,  
Oct. 27.

Suspension.

M'KECHNIE, for the respondent.—The Bill is incompetent. The conviction was obtained in virtue of the General Police and Improvement (Scotland) Act, 1862. The suspender ought therefore to have appealed to the next Circuit Court, in terms of section 430 thereof.

KENNEDY, for the suspender.—The sentence was incompetent and null. It bears to proceed partly upon the judicial confession of guilt and partly upon the evidence adduced. There was no judicial confession of guilt. The suspender tendered a plea of having been drunk and swearing. There was no charge of being drunk. What was charged against the suspender was the conducting himself in a drunken and disorderly manner by cursing and swearing, which a sober man may do. The plea was intended in reality as a plea of not guilty, and it was incompetent to treat an admission up to a certain point, and what really amounted at most to a partial admission, as a judicial confession, and to extract a conviction partly from it and partly from evidence adduced, after the plea had not been accepted. *Gray v. M'Gill*, High Court, Feb. 27, 1858, Irv. vol. iii., p. 29. Secondly, Although two Magistrates tried the case, only one of them has signed the conviction.

LORD YOUNG.—He has omitted, you say, to add P after his name.

KENNEDY, for the suspender.—He has. And although in terms of section 408 of the General Police Act of 1862, One Magistrate may try for this offence, nevertheless, if two are present both must sign, otherwise it must be inferred that the other Magistrate did not concur in the

1882. sentence or in the guilt of the complainer. *Ranken v. Alexander*, High Court, Feb. 15, 1836, Swin., vol. i., p. 44 ; *Williamson v. Thomson*, High Court, Nov. 29, 1858, Irv., vol. iii. p. 295. Lastly, If the conviction and sentence is, as we contend, essentially null, the proceedings are not taken by virtue of the General Police Act : the provision in section 430 of that Act, therefore, limiting review to the next Circuit Court, does not apply, and this Bill is competent.

No. 18.  
Cochran  
v.  
Ferguson.

High Court,  
Oct. 27.

Suspension.

M'KECHNIE, for the respondent.—The evidence apart from the confession which was made, was sufficient to warrant the conviction. But the suspender was convicted on 24th July, and he paid the fine and left the Court before the sentence was written out, and this Bill is not brought till 14th October. There was, we contend, here such an amount of acquiescence on his part, and such lapse of time as is sufficient to overcome all technical difficulties. The objection to the form of the conviction is an *ex post facto* one. *Skinner v. Adamson*, High Court, March 12, 1842, Broun, vol. i., p. 67 ; *M'Lure v. Douglas*, High Court, Jan. 31, 1872, Couper, vol. ii. p. 177. At all events, this is an objection to want of form, and the conviction is protected by section 34 of the Summary Procedure Act of 1864, which declares that no conviction in pursuance of that Act shall be quashed on that ground.

KENNEDY for the suspender.—There was no Circuit Court to which the suspender could have gone. The first Circuit Court at Ayr was held on 1st August, which did not admit of fifteen days' notice being given in terms of section 34 of the Heritable Jurisdiction Act. The suspender was therefore not in delay on that ground. And the fact that the sentence had been written out in his absence is in itself a ground of nullity. He paid the fine to avoid imprisonment.

LORD JUSTICE-CLERK.—I think that the prayer of this Bill must be passed. The Magistrates have proceeded to convict the accused, partly on the ground of a statement



in law entitled him to come to that conclusion. And, 1882.  
as I have already said, I think they were.

As to the objection of want of specification, I must say that I think the complaint is bare enough in that respect; but still there is sufficient specification. And, at all events, this objection was not taken at the trial; and when an objection of this sort is not taken then, but is raised for the first time on a Case stated with reference to some real or supposed error in law by the Magistrate, I do not think that, as a general rule, we ought to go back on the objection.

No. 17.  
Milton  
v.  
M'Phee.  
High Court,  
Oct. 27.  
Appeal.

LORD CRAIGHILL and the LORD JUSTICE-CLERK concurred.

The following was the Interlocutor :—

*'Edinburgh, 27th October 1882.—Having considered this Case, and heard counsel for the parties, dismiss the Appeal: Affirm the determination of the inferior Judge: Find the respondent entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the appellant.'*

Agent for the Appellant—J. LINDSAY, Writer, Glasgow.  
Agents for the Respondent—CAMPBELL & SMITH, S.S.C.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

JOHN COCHRAN, Suspenders.—*Kennedy.*

AGAINST

ARCHIBALD BARCLAY FERGUSON, Respondent.—*M'Kechnie.*

CONVICTION, PARTLY ON CONFESSION AND PARTLY ON EVIDENCE —  
CONVICTION, NULLITY OF—SUMMARY PROCEDURE ACT, 1864, SEC. 34  
—FORM, OBJECTION TO — CONVICTION, SIGNING — MAGISTRATE,  
POLICE—COMPETENCY OF SUSPENSION—STATUTE 25TH AND 26TH  
VIC., c. 101, SEC. 430 (General Police and Improvement (Scotland)  
Act, 1862)—DELAY AND ACQUIESCENCE—MORA.—A conviction  
upon a summary complaint which bore to proceed partly in respect

Present.

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

GIDEON CHARLES DEAKIN, SAMUEL M'INALLY, DAVID MAR  
GEORGE MERRITT (Members of the Salvation Army), Ap-  
—*J. P. B. Robertson and Hay.*

AGAINST

JOHN MILNE, Respondent—*Sol.-Gen. (Macdonald) and C. S.*

BREACH OF THE PEACE—SALVATION ARMY—ACT 1606, CAP.  
for staying unlawful conventions within Burgh)—BURGH—  
SIONS, PUBLIC—DESUETUDE—PROCLAMATION—MAGISTRATES  
OF.—A body of persons known as the Salvation Army hav  
in the habit of walking in procession through the stre  
Burgh in a manner which seemed to the Magistrates a  
to the lieges, and likely to occasion a breach of the pe  
Magistrates issued a proclamation under the Act 1606, c  
which they prohibited all such processions, and gave no  
those taking part in them would render themselves liable t  
cution and penalty. The Salvation Army, in disregard  
proclamation, made a procession through the streets of the  
a noisy and disorderly character, and certain members  
being convicted (1) of breach of the peace, and (2) of brea  
terms of the proclamation, appealed.—Held that the  
whether the procession and crowd had a tendency to cause  
cause a breach of the peace was a question of fact, a judgm  
which the Magistrate was entitled to reach. Secondly,  
Magistrates were entitled to issue, and had in the circum  
very properly issued, the proclamation, breach of which was  
cipal offence, and that the appellants having wrongfull  
garded the proclamation, they were rightly convicted of  
of its terms, and the appeal dismissed accordingly.

1882.

No. 19.  
Deakin  
and Others  
v.  
Milne.

High Court,  
Oct. 27.

Appeal.

The appellants in this case, GIDEON CHARLES D  
SAMUEL M'INALLY, DAVID MARTIN, and GEORGE M.  
all of Arbroath, were charged, upon 9th October  
before the Chief Magistrate of that Burgh in the  
Court there, upon a complaint under the Su  
Jurisdiction (Scotland) Acts, 1864 and 1881, at  
stance of the respondent, JOHN MILNE, the Proc  
Fiscal of Court, with having 'each and all, or

more of them, been guilty of the crime of breaking the public peace, as also of a breach of the terms of a proclamation made and published by the Provost and Bailies of Arbroath, on the 17th day of March 1882, by virtue of the powers conferred on them by the Act of Parliament passed in the reign of James the Sixth, in the year 1606, cap 17,<sup>1</sup> actors or actor, or art and part':

1882.  
 No. 19.  
 Deakin  
 and Others  
 v.  
 Milne.  
 High Court,  
 Oct. 27.  
 Appeal.

IN SO FAR AS, on the 1st day of October 1882, or one or other of the by-past days of that month, the said Gideon Charles Deakin, Samuel M'Inally, David Martin, and George Merritt, have each and all, or one or more of them, been guilty of the crime of breaking the public peace, as also of the offence of breaking the terms of the aforesaid proclamation, and this they did by marching in procession along High Street, Applegate, Ladybridge Street, and John Street, Newgate, all of Arbroath, carrying a flag or banner, singing and shouting aloud at the top of their voices, waving their arms and gesticulating in a grotesque manner, and did otherwise make a great noise and disturbance, by all which the lieges were annoyed and disturbed, a large crowd of people collected, the orders of the said Provost and Bailies defied and set at nought, and a breach of the public peace was committed.

At the hearing of the complaint before the Magistrate,

---

<sup>1</sup> Act of Parliament passed in the reign of James the VI., in the year 1606, cap. 17. The Act, which is entitled 'Act for staying of unlawful conventions within Burgh, and for assisting of the Magistrates in execution of their offices,' ratifies and approves all and whatsoever Acts, &c., for staying of all tumults, unlawful meetings, and conventions within burgh, 'With this addition, that na person nor persons within burgh, of whatsoever rank, quality, or condition they be of, presume nor take upon hand from this forth, under whatsoever cullour or pretext, to convocat or assemble themselves together at any occasion, except they make due intimation of the lawful causes of their meetings, to the Provest and Bailies of that burgh, and obtain their licence thereto; and that na thing be done nor attempted by them in their saids meetings whilk may tend to the derogation or violation of the Acts of Parliament, lawes, and constitutions made for the well and quyetness of the saids burghs: Declaring by thir presents, the saids unlawful meetings, and the persons present thereat to be factious and seditious, and all proceedings therein to be null and of nane avall, and the saids persons to be punished in their bodies, goods, and geare with all rigour conforme to the lawes of this Realme.'

1882. the following preliminary objections were taken  
 No. 19. repelled—namely, (1) That the complaint, so far as  
 Deakin charges the accused with a breach of the terms of  
 and Others proclamation therein referred to, is irrelevant, a  
 v. Milne. a charge not being a *nomen juris* according to  
 High Court, law of Scotland. (2) That the Act 1606, cap.  
 Oct. 27. referred to in the complaint, is in desuetude, and in  
 Appeal. case never had and has no reference to processions  
 people met for an innocent, peaceable, and lawful  
 pose. (3) That the Act founded on was not specified  
 the proclamation referred to, nor any publication the  
 made at the Market Cross. (4) Neither intimation  
 the proclamation to, nor knowledge thereof on the part  
 any of the accused is set forth in the complaint.  
 That the hour or hours during which the procession took  
 place are not specified. (6) That the complaint is  
 ungrammatically and erroneously expressed; and the  
 accused are charged with having been guilty of  
 crimes or offences imputed to them, whereas the Courts  
 of Queen's Bench in London have held Salvation Army  
 processions to be legal: and it is incompetent to charge  
 in one and the same complaint two or more offences  
 which have no necessary connection with each other.

The appellants having pleaded not guilty, the Magistrate, on the evidence adduced, found them guilty of both the offences charged, and fined Deakin and M'Inally each in the sum of sixty shillings, or imprisonment for thirty days, and Martin and Merritt each in the sum of thirteen shillings, or fourteen days imprisonment each.

The present Case on appeal was thereupon obtained and presented, and the following were the facts then set forth:—

A copy of the following letter by the Town Clerk of Arbroath to the appellant Gideon Charles Deakin was produced in Court, admitted to have been received by him, namely:—

‘Town Clerk's Office, Arbroath, 30th Sept. 188

‘Sir,—Serious complaints have been made to the Magistrate

the processions of the so-called Salvation Army on Sunday last, and of the annoyance and disturbance caused to the other inhabitants. The Magistrates met on Tuesday in consequence of these complaints, and they have instructed me to draw your attention to them, and to inform you that the Magistrates are satisfied of the expediency of the resolution formerly adopted by them of prohibiting such processions, and mean strictly to enforce it. I am to express the hope that there will be no further infringement of the proclamation or any other disorderly proceedings, otherwise it may be necessary for the Magistrates to curtail the privileges at present enjoyed.—Your obedient servant,

(Signed) 'W. K. Macdonald.'

1882.  
 No. 19.  
 Deakin  
 and Others  
 v.  
 Milne.  
 High Court,  
 Oct. 27.  
 Appeal.

A printed copy of the proclamation mentioned in the complaint was laid before the Court, and proof adduced of its publication as of the date it bears—viz., 17th March 1882. That proclamation is as follows :—

‘Proclamation by the Magistrates.

‘The Magistrates of Arbroath finding that processions of certain persons calling themselves members of the “Salvation Army,” and of other persons and young people through the streets and suburbs, are leading to riotous proceedings, and are likely to cause a breach of the peace: Hereby prohibit all such processions, and give notice that all persons taking part therein from and after this date will render themselves liable to prosecution.

‘By order,

‘W. K. Macdonald, Town Clerk.’

‘Given at the Council Chamber, Arbroath, the seventeenth day of March 1882.’

The facts of the case (as proved to my satisfaction at the trial by the sworn evidence of thirteen witnesses for the prosecutor) are, that the appellants, after holding an open air service at the Abbey Gate of Arbroath, marched in procession, carrying a flag or banner, about half-past ten o'clock on the morning of Sunday, the first day of October 1882, from the said Abbey Gate down High Street, Applegate, Lady-bridge Street, and John Street, Newgate of Arbroath, singing and shouting aloud at the top of their voices, so loud, as deposed to by one of the witnesses, as to be heard over half of the town of Arbroath, waving their arms and gesticulating in a grotesque manner, causing the assemblage of a mob of persons and obstructing the whole passage of the said streets from pavement to pavement on each side, to the annoyance of the lieges, and causing a breach of the peace, and in violation of the terms of the said proclamation. Five witnesses (adduced by the appellants), evidently sympathisers with and who followed the Salvation Army on the occasion libelled, gave their opinion that no disturbance took place, that the procession was

1882. orderly, and that no breach of the peace was committed. On the  
 — evidence adduced at the trial, the appellants were found guilty by me  
 No. 19. of both the offences charged in the libel, and the said Gideon Charles  
 Deakin and Others Samuel M'Inally were each fined in the sum of sixty  
 v. shillings, or imprisonment for thirty days each, and the said David  
 Milne. Martin and George Merritt each in the sum of thirty shillings, or  
 High Court, fourteen days' imprisonment each.  
 Oct. 27.

Appeal.

The questions of law for the opinion of the Court of Justiciary were:—

1. Whether or not the appellants at common law were properly convicted of a breach of the peace in consequence of their acts held proven on the occasion libelled?

2. Also whether or not they were properly convicted of an offence punishable by a Magistrate of the Burgh in consequence of violating the provisions of the said proclamation issued in virtue of the powers conferred upon the Magistrates by the said Act James the Sixth, in the year 1606, cap. 17, or otherwise in virtue of their powers as Magistrates of Arbroath on the occasion libelled?

3. Whether or not the appellants were, under all the circumstances of the case, properly convicted of the charges libelled against them in the said complaint?

HAY, for the appellants.—The complaint charges two offences, viz., breach of the public peace, as also breach of the terms of a proclamation made and published by the Magistrates of Arbroath, in March last, by virtue of the powers conferred on them by the Act 1606, c. 17; and the appellants were convicted of both of these offences. We contend that the facts stated in the Case as proved do not amount to breach of the peace, and that nothing of the nature of that offence appears to have been committed on the occasion—at all events by the appellants or by the Salvation Army. Sheriff Barclay, in his “Digest,” fourth edition, p. 97 in defining ‘breach of the peace,’ says, ‘In an extended sense assault, rioting, mobbing, sedition, sending threatening or incendiary letters, challenges to fight duels, and similar offences, are included within the term “breach

of the peace." But in the more limited and more proper sense the term is applied to a brawl, fight, quarrel, or strife, so loud and so long continued as to disturb and alarm the neighbourhood.' From the facts as stated in the case, it appears that there was nothing took place on the occasion libelled of the nature either of what is included within this extended, or within the more restricted definition. There was no rioting, no mobbing, nothing of the nature of sedition. Nor was there any one assaulted; nor even brawling, fighting, quarrelling, or any kind of strife on the part of the accused or of the Salvation Army. Any acts done of an illegal nature were proved to have been committed, not by the accused or those with whom they sympathised, but by those who opposed the Salvation Army, viz., the Skeleton Army, or others in the street at the time. The appellants and their friends used no violence and assaulted no one. The objects which the Army have in view are perfectly legal and even meritorious. That body believe that it is justifiable and right to employ compulsion, even to the extent of using in some cases force in order to compel others to become religious. And they are in the habit of parading the streets of towns, singing and shouting hymns for the purpose of attracting persons to their religious meetings. *Beatty v. Gillbanks*, June 13, 1882, L.R., IX., Queen's Bench Div., p. 308.

LORD YOUNG.—Then if they went the length of taking a wicked man by the cuff of the neck and compelling him to come in, the object, you say, would be good, and that would justify the act.

The LORD JUSTICE-CLERK.—That the purpose of an act is lawful or even meritorious will not always justify the act. An assembly which is not an unlawful assembly may so assemble as to commit a breach of the peace. Here it is said that your conduct had a tendency to promote a breach of the peace.

HAY, for the appellants.—We say that the purpose of

1882.

No. 19.  
Deakin  
and Others  
v.  
Milne.

High Court,  
Oct. 27.

Appeal.



1882.  
 No. 19.  
 Deakin  
 and Others  
 v.  
 Milne.  
 High Court,  
 Oct. 27.  
 Appeal.

their conduct being legal, the appellants did nothing that was illegal. There was no force or violence used or threatened to be used by them or by the Salvation Army on the occasion. There was no conflict with the crowd. No one was addressed personally, and so no offence can be said to have been given personally. Others may have followed the Army and have caused an obstruction, but there was no obstruction to the streets, caused by the Army itself; and at all events, obstruction is not the offence which was charged, and if it occurred it was caused by those who opposed the Army, viz., the Skeleton Army, or by others who thought proper to follow.

LORD YOUNG.—You say that they were shouting and singing hymns in the public streets, in order to attract a crowd and induce people to join in their religious services; is that not obstruction?

HAY, for the appellants.—Their object, no doubt, was to attract people from the street to their place of worship, and that is a perfectly legitimate purpose, as was found in the case of *Beatty v. Gillbanks*, quoted.

LORD YOUNG.—Could that not be managed without having recourse to such ridiculous proceedings as annoyed the inhabitants, and were likely to lead to a breach of the peace, and which also obstructed the traffic in the streets?

HAY, for the appellants.—No breach of the peace was committed by the appellants. They were there with a perfectly lawful and laudable object. We may not admire the means by which they sought to carry out that object; but it was a lawful object. There is no charge of obstructing the traffic. In the case of *Beatty v. Gillbanks*, the facts in which case were almost identical with those in the present case, it was held that persons who assembled for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace

would be committed by those who opposed it, could not be rightly convicted of an unlawful assembly. We contend that the same principles should be applied to the present case. Regarding the second offence, the breach of the proclamation, we contend that the Act 1606, c. 17, upon which it is founded, is in desuetude, and that the issuing of the proclamation was outwith the Magistrates' common law power, and at all events it had no application to the circumstances of the present case. That Act is entituled 'Act for staying of unlawful conventions within Burgh, and for assisting of the Magistrates in execution of their offices : ' but the processions complained of are in no sense of the words unlawful conventions. The complaint in so far therefore as it charges a breach of the proclamation issued in virtue of the powers conferred on the Magistrates by this Statute, is incompetent and irrelevant, and the conviction for breach thereof should be set aside. The questions in the case ought therefore, we contend, to be answered in the negative.

C. S. DICKSON, for the respondent.—The complaint is, we submit, well laid, and the conviction should be sustained. The proceedings of the Salvation Army had been going on for some months. Opposition was excited, an antagonistic army was raised, called the Skeleton Army, and these coming into collision, there were consequently regular organised street fights within the burgh. Accordingly a number of people of both armies were brought before the Magistrates and fined, and the proclamation was issued and published ; and it was only after it had been disregarded that the prosecutions complained of were instituted. There is no authority for the contention that the Act of 1606 is in desuetude. The issuing of the proclamation and the institution of the prosecutions were quite legal, and were proper and necessary acts on the part of the Magistrates. The offence is charged, and the proclamation is referred to in the complaint, more for the purpose of showing

1882.

---

No. 19.  
Deakin  
and Others  
v.  
Milne.

---

High Court,  
Oct. 27.

---

Appeal.

---

1882. that the principal offence, viz., the breach of the peace, was committed after due warning had been given to the appellants, and, so charged, more as an aggravation of the first offence; and it is perfectly relevant. In regard also to the charge of breach of the peace, the allegations are quite relevant. The Army was going in procession along the street and continuously shouting. There is a great deal more in this case than there was in the case of *Ritchie v. M'Phee*, decided on in this Court on 25th October 1882. Couper, *supra* page 147. There were here a number of people in union, going about, no doubt, with excellent intentions, but with the intention and object also of collecting a crowd. Their aim and object is to shout, so that their shouts may be taken as an invitation to come and join them, and the louder the shouts the greater they anticipate will be the crowd. This conduct was complained of by many respectable people, and when the Magistrates found that the warning already given by the previous prosecution of persons belonging to both the armies was not sufficient, they were not only entitled, but bound, to issue the proclamation; and, upon its being disregarded, to prosecute in the manner complained of. The conduct of the appellants, as appears from the facts stated in the case, clearly amounted to breach of the peace. The appellants were competently convicted of that offence and of the breach of proclamation. The appeal ought therefore, we contend, to be dismissed, and the questions answered in the affirmative.

The LORD JUSTICE-CLERK.—In the opinion which I have formed in this case I do not desire to say anything that would for a moment be considered to reflect on the motives or objects of the persons whose conduct has here been brought in question. I believe that many of them are respectable persons, who are sincere in the work that they have undertaken, and that many of the opinions that they promote are laudable; but with that matter, however, we have nothing to do. The question relates

No. 19.  
Deakin  
and Others  
v.  
Milne.

High Court,  
Oct. 27.

Appeal.

to the preservation of the order and peace of this burgh.

It appears that this class of persons called the Salvation Army, and another band who have a designation of their own, have been in the habit of making processions on the Sunday forenoons, to the great disturbance of the inhabitants, and also, as the prosecutor says, and the Magistrates have found, to the endangering of the public peace. The Magistrates had made various attempts to stop these proceedings, and obtained convictions against some of the participators, but, finding that the evil by no means diminished, they issued a proclamation on the 17th of March to prevent these disturbances. It appears to me that it was an exceedingly proper and discreet proceeding on the part of the Magistrates, and that it was entirely within their power, not if these persons neither endangered the public peace nor annoyed the inhabitants, but if they were satisfied, on reasonable grounds, that what these people did had a tendency to such a result. And I cannot imagine that anyone would come to any other conclusion than that the Magistrates, being responsible for the peace and good order of the burgh under their jurisdiction, were in such a case justified in issuing a proclamation that those taking part in these processions would render themselves liable to prosecution. But, notwithstanding this proclamation, these persons did turn out, and there was a breach of the peace, and the result is that they are charged with a breach of the peace, or inciting to a breach of the peace, and secondly, with a breach of the proclamation by the Magistrates.

I am of opinion that the proceeding of the Magistrates was perfectly proper. There are many processions that may take place in the streets of a burgh which may attract a good deal of attention, but which the Magistrates are quite entitled to permit. There are objects in which the inhabitants of the towns may take a legitimate interest; but the limit to that necessarily is that the assembling of persons, and the behaviour of persons

1882.

---

No. 19.  
Deakin  
and Others  
v.  
Milne.

---

High Court,  
Oct. 27.

---

Appeal.

---

1882. when they so assemble, shall be within the law. But  
 No. 19. when it leads to breach of the peace, however good the  
 Deakin intentions of the persons may be, the Magistrates are  
 and Others entitled to interfere; and therefore I hold that the  
 v. Magistrates, having decided, upon the facts in the first  
 Milne. place, that this procession and crowd had a tendency to  
 High Court, cause, and did cause, a breach of the peace, came to a  
 Oct. 27. conclusion which they were entitled to reach. I think  
 Appeal. it is impossible to say that they had not the means of  
 reaching the conclusion they did on these facts. In  
 the second place, I think that a breach of the proclama-  
 tion which they were entitled to issue was a municipal  
 offence, and on the whole, therefore, I think that there  
 is no ground whatever for the appeal.

LORD YOUNG.—I am of the same opinion, and have  
 really nothing to add. I must, however, say this, that  
 the use of the streets of a town and the conduct of the  
 people on the streets of a town cannot admit of any  
 very stern or rigid rules to be enforced in all cases.  
 There is a good deal of discretion and even forbearance  
 to be exercised in regard to the use of the streets. En-  
 thusiastic politicians, or enthusiastic students marching  
 through the streets in bands are not to be seized by the  
 police and dragged off to prison; nor are any other  
 very stern measures to be used against them if nothing  
 serious occurs or is reasonably to be apprehended. With  
 regard to this Salvation Army, I think the Magistrates  
 of any town should observe a good-natured abstinence  
 from interference, and continue in tolerance of them, so  
 long as there is no evil arising or to be reasonably  
 apprehended. I think we have every reason to believe  
 that the Magistrates of Arbroath here behaved with  
 perfect discretion and with much good-nature and pro-  
 longed forbearance, as was their duty. When at last  
 they were satisfied that the proceedings of this Army  
 were inconsistent with the maintenance of that decorum  
 and good order on the streets which they exist for the  
 purpose of maintaining, I come to the opinion with you

Lordship that this proclamation and this prosecution for breach of the peace, committed as set forth in the papers before us, were altogether right, and that we have no grounds whatever for interfering with them. I should like to say further, that after the warning that was given, and the transgression in violation of the public peace and of decency and good order, I am of opinion that the punishment inflicted was exceedingly moderate, and that if any wrong-headed obstinacy in persevering is manifested such conduct would very properly be visited with more severe pains and penalties.

LORD CRAIGHILL.—I concur with the judgment at which your Lordships have arrived, and agree with the reasons given for the judgment. It appears to me that the Magistrates of Arbroath were quite entitled to do that which was done—in the first place, to issue a proclamation, and afterwards to take measures for enforcing it; and that they would have failed in their duty if they had not done so. And I cannot help expressing my regret that such a proclamation should have been disregarded. However much the purity of motives, or however strong the desire to do good, it is not a right thing that the results, however laudable and good, should be attained by means leading to such evils. When these parties saw that the first result of their proceedings was to bring about with almost certainty a breach of the public peace they should have desisted.

The following was the Interlocutor:—

‘*Edinburgh, 27th October 1882.*—Having considered this Case, and heard counsel for the parties, Dismiss the appeal, affirm the determination of the inferior Judge, and decern.’

Agent for the Appellants.—WM. GUNN, S.S.C.

Agent for the Respondent.—WEBSTER, WILL, & RITCHIE, S.S.C.

1882.

No. 19.  
Deakin  
and Others  
v.  
Milne.

High Court,  
Oct. 27.

Appeal.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

JAMES SMITH, Appellant—*M'Kechnie*.

AGAINST

GEORGE MURE WOOD, Respondent—*Gillespie*.

LOCOMOTIVES ON HIGHROADS—EMPLOYMENT OF CHILDREN—  
28 AND 29 VIC., c. 83, SECS. 2 AND 3 (Locomotives Act,  
STATUTE 41 AND 42 VIC., c. 58, SEC. 4 (Locomotives Am  
(Scotland) Act, 1878)—STATUTE 1ST AND 2ND WILLIAM IV  
SEC. 99 (Turnpike Roads (Scotland) Act, 1831)—STATUTE  
25 VIC., c. 70, SEC. 12 (Locomotives Act, 1861)—STATUTE  
42 VIC., c. 51, SEC. 123 (Roads and Bridges (Scotland) Ac  
—'PERSON'—CHILD—ROAD.—The Locomotives Act, 1861  
3, as amended by the Locomotives Amendment (Scotland) A  
section 4, enacts that at least three persons shall be emp  
drive or conduct every locomotive propelled by steam on a  
pike road, and that one of such persons, while the locomot  
motion, shall accompany the locomotive on foot, and shall i  
need assist horses and carriages drawn by horses passing th  
In an appeal against a conviction and sentence pronounced  
complaint for a contravention of these sections, it was  
that the Justices having found it proved that two competent  
were in charge upon the locomotive in question on the  
libelled, and that a boy of thirteen, who was in the habit o  
charge of horses, was in advance of said locomotive at the  
was incompetent, in terms of these provisions, to convic  
contravention charged: Held that the Justices having :  
substance that in point of fact the provisions of the statutes  
been complied with, the conviction was competent, and the C  
not called upon to determine the general question whether  
ployment of a boy of thirteen years of age, to precede a locon  
foot, was a compliance with the requirements of the statutes  
Opinion per Lord Craighill, that on the question of law the  
were right.

THIS was an appeal at the instance of JAMES  
Broomhill House, Lasswade, against a conviction  
sentence pronounced in a Justice of the Peace C  
Edinburgh, adjudging in a penalty of five pound



one month's imprisonment in default of payment, upon a complaint at the instance of GEORGE MURE WOOD, Procurator-Fiscal of Court.

The appeal set forth that—

This is a cause in which the said Fiscal sues the said James Smith under the Act of Parliament 28 and 29 Victoria, chap. 83,<sup>1</sup> as amended by the Act 41 and 42 Victoria, chap. 58,<sup>2</sup> for a penalty not exceeding £10 sterling, in respect that on the 11th day of August last the said James Smith having on the turnpike road between

1882.

No. 20.  
Smithv.  
Wood.High Court,  
Dec. 6.

Appeal.

<sup>1</sup> Statute 28 and 29 Vic., c. 83 (The Locomotives Act, 1865).

Sec. 2.—‘Repeals the 5th, 9th, 11th, and 15th sections of the Locomotive Act of 1861 (24 and 25 Vic., c. 70), and declares by section 13 that the Locomotives Act, 1861, and this Act (The Locomotives Act, 1865) shall be construed together as one Act.’

Sec. 3.—‘Every locomotive propelled by steam, or any other than animal power, on any turnpike road or public highway, shall be worked according to the following rules and regulations, viz :—

‘*Firstly*.—At least three persons shall be employed to drive or conduct such locomotive, and if more than two waggons or carriages be attached thereto, an additional person shall be employed, who shall take charge of such waggons or carriages.

‘*Secondly*.—One of such persons, while any locomotive is in motion, shall precede such locomotive on foot by not less than sixty yards, and shall carry a red flag constantly displayed, and shall warn the riders and drivers of horses of the approach of such locomotive, and shall signal the driver thereof when it shall be necessary to stop, and shall assist horses and carriages drawn by horses passing the same. . . .

‘In the event of a non-compliance with any of the provisions of this section the owner of the locomotive shall, on summary conviction thereof before two Justices, be liable to a penalty not exceeding ten pounds, but it shall be lawful for such owner, on proving that he has incurred such penalty by reason of the negligence or wilful default of any person in charge of or in attendance on such locomotive, to recover summarily from such person the whole or any part of the penalty he may have incurred as owner.’

<sup>2</sup> Statute 41 and 42 Vic., c. 58 (Locomotives Amendment (Scotland) Act, 1878), section 4.—‘The paragraph numbered “secondly” of section 3 of the Locomotives Act, 1865, is hereby repealed so far as relates to Scotland, and in lieu thereof the following paragraph is hereby substituted :—*Secondly*—One of such persons, while the locomotive is in motion, shall accompany the locomotive on foot, and shall in case of need assist horses and carriages drawn by horses passing the same.’

1882. Hillend Farm and Lothian Burn, in the said county, a locomot  
 No. 20. propelled by steam, and drawing a thrashing-mill, 'had not one  
 Smith three persons employed to drive or conduct said locomotive accompa  
 v. nying the same on foot while it was in motion, and in case of ne  
 Wood. assisting horses and carriages drawn by horses passing the same.'  
 High Court, It was proved to the Justices that on the occasion in question, th  
 Dec. 6. were two men upon the said locomotive, and that on foot in front  
 Appeal. said locomotive there was a boy of thirteen years of age.

It was also proved to the Justices that this boy was in the serv  
 of Mr James Dickson, farmer, Damhead, in the county of Edinbur  
 and in the habit of taking charge of horses.

The Justices held that keeping in view the terms of clause 99  
 the General Turnpike Act 1 and 2, Gul. IV. chap. 43,<sup>1</sup> and which  
 held to be incorporated with 'The Roads and Bridges (Scotland) A  
 1878,' which declares, 'that no waggon or cart travelling on a  
 turnpike road shall be driven by any person who shall not be of t  
 full age of fourteen years,' and the fact that the object of having c  
 of the three persons on foot is 'in case of need to assist horses a  
 carriages drawn by horses passing the same,' held that the employme

---

<sup>1</sup> Statute 1st and 2nd Will. IV., c. 43 (Turnpike Roads Act, 183  
 Section 99.—'And be it enacted that no waggon or cart travelli  
 on any turnpike road shall be driven by any person who shall not  
 of the full age of fourteen years, under a penalty,' &c.

Statute 24 and 25 Vic., c. 70 (Locomotives Acts, 1861.)

Section 12. [Not repealed by the above second section of 'T  
 Locomotives Act, 1865.']—'All the clauses of any general or local a  
 relating to turnpike roads or highways shall, so far as the same :  
 not expressly altered or repealed by or are not inconsistent with t  
 provisions of this Act, apply to all locomotives propelled by otl  
 than animal power, and to all waggons, trains, carts, and carriages  
 any other description drawn by said locomotive, and to t  
 owners and drivers and attendants thereof, in like manner, as  
 drawn by animal power,' &c.

Statute 41 and 42 Vic., c. 51 (Roads and Bridges (Scotland) A  
 1878).

Section 123.—'The following sections of the Act passed in the fi  
 and second years of the reign of His Majesty King William t  
 Fourth, chapter 43, viz. . . . sections ninety-six to one hundred a  
 eight, both inclusive (the enactments whereof are contained  
 Schedule C to this Act annexed), in so far as the same are i  
 inconsistent herewith shall be and are hereby incorporated with tl  
 Act, and, from and after the commencement of this Act, in any coun  
 shall extend and apply to all the highways made or to be m=  
 within such county,' &c., &c.

in this capacity of a boy of thirteen was not a compliance with the requirements of the Act 28 and 29 Victoria, chap. 83,<sup>1</sup> as amended by the Act 41 and 42 Victoria, chap. 58, and that accordingly the said James Smith had been guilty of 'the contravention charged.'

1882.

No. 20.  
Smithv.  
Wood.

The question of law for the opinion of the Court is :—

High Court,  
Dec. 6.

Appeal.

Whether the employment of a boy of thirteen years of age is a compliance with the requirements of the Act 28 and 29 Victoria, chap. 83, as amended by the Act 41 and 42 Victoria, chap. 58 ?

M'KECHNIE, for the appellant.—Having stated the facts and referred to the enactments in the notes, contended. The Justices having found that it was proved that upon the occasion libelled there were two men upon the locomotive who were competent to perform the duties imposed on them, and that there was also a boy of thirteen years on foot in front of that locomotive, who was competent to manage and take charge of horses, it was incompetent to interpret the statutes libelled, viz., The Locomotives Acts, 1865, and The Locomotives Amendment (Scotland) Act, 1878, by a reference to a provision in an old Turnpike Act in the reign of William the Fourth, which we contend does not apply to locomotives on public roads, but to carts and carriages drawn by animal power. But for the 99th section of the latter Act (see note 1, p. 188) it would have been implied by the terms of the provisions of the Locomotive Acts that the age of the boy would form no objection, provided he was capable of performing the duties imposed by the statute upon those conducting locomotives on public roads. In the absence therefore of any provision in the Locomotives Acts themselves, and of any averment of incapacity in the complaint; and in view of the finding in the Case that the boy had been in the habit of managing horses, the conviction was, we contend, incompetent, and ought to be quashed.

---

<sup>1</sup> See Note 1, page 187.

1882.

No. 20.  
Smith  
v.  
Wood.

High Court,  
Dec. 6.

Appeal.

LORD YOUNG.—Would it be competent to put an aged person, or a person with a wooden leg, either upon or on foot in front of, the locomotive ?

GILLESPIE, for the respondent.—The Justices might, perhaps, be entitled to find that such a person was unsuitable from being incapable to perform the duties imposed upon him by the statutes.

LORD CRAIGHILL.—Then the matter is one of discretion in the Magistrates ?

GILLESPIE, for the respondent.—If the enactment in section 99 of the Turnpike Act, 1831, is held not to be included within the provisions in the Locomotives Acts libelled, the Justices, in determining what shall be held to be a ‘person’ in terms of the Locomotives Acts, were, of course, not entitled to be guided by the provisions in the statute of Will. IV. in regard to an analogous matter, viz., the driving or conducting carts and carriages when propelled by animal power on the highway. But if effect be given, as we contend it ought, to the provisions of the Locomotives Acts and of the Roads and Bridges Act, 1878 (see footnotes, pp. 187 and 188), that 99th section must be held to be incorporated and be read along with the Locomotive Acts. Said 99th section prohibits the employment of children as drivers of waggons, &c., propelled by animal power upon the public roads ; and by section 12 of the Locomotives Act of 1861 (see footnote 3, p. 188) (which, it will be observed, is not repealed by the second section of the Act of 1865), it is provided that all the clauses and provisions in any General Acts relating to turnpike roads, shall apply to all locomotives propelled by other than animal power . . . and to all owners, drivers, and attendants thereof.

The LORD-JUSTICE CLERK.—How is that provision incorporated with the Locomotives Act, 1865 ?

GILLESPIE, for the respondent.—By section 2 of the Act of 1865, the ‘Locomotives Act of 1861’ is partly repealed (see note 1, p. 187), but section 12 of the Act

of 1861 is not repealed. It provides that all clauses in General Acts relating to turnpike roads, including the 99th sec. of the Act of Will. IV., shall apply to locomotives, and the owners and drivers thereof (see footnote 1, p. 188), and by section 13 of the Act of 1865, it is provided that both acts shall be read together. Our contention, therefore, is that section 3 of the Act of 1865, in providing that there shall be at least three persons employed on every locomotive, 'to drive or conduct such locomotive'—and secondly 'that such persons (*i.e.*, such drivers or conductors) shall precede such locomotive on foot,' thereby intended to provide that the persons who were to drive and conduct locomotives upon public roads, were to be—as is the case in regard to waggons and carriages travelling on public roads—persons over fourteen years of age. We therefore contend that in respect that one of the persons employed on the occasion libelled, was under fourteen years of age, the Justices rightly convicted, and the question in the case ought to be answered in the negative.

LORD YOUNG.—The appellant here was accused of this—that he 'had not one of three persons employed to drive or conduct a locomotive accompanying the same on foot while it was in motion upon a public road, and in case of need assisting horses and carriages drawn by horses passing the same.' The Justices found affirmatively that he had not a person so employed accompanying the locomotive on foot, and they convicted him. That conviction is the subject of appeal, and on this ground—that the appellant has proved that there was a boy of thirteen years of age performing that duty on the occasion in question. In these circumstances, the question put to us by the Justices is, 'Whether the employment of a boy of thirteen years of age is a compliance with the requirements of the Act 28 and 29 Vict., c. 83, as amended by the Act 41 and 42 Vict. c. 58?' Now, I am not prepared to assent to the proposition that a conviction is necessarily bad because it is proved that it

1882.

No. 20.

Smith

v.

Wood.

High Court,  
Dec. 6.

Appeal.

1882. was a boy of thirteen who was walking in front of  
 No. 20. locomotive in order to perform the duties imposed  
 Smith the Act. The Justices, having jurisdiction to determine  
 v. whether the boy was in fact competent, have in substance  
 Wood. found that he was not competent, and upon that point  
 High Court, I am not in the least degree prepared to interfere  
 Dec. 6. their judgment. But upon the question whether a  
 Appeal. however capable of performing the duties required by  
 the Act, is nevertheless disqualified from doing so by an  
 absolute provision of the Legislature, as he certainly is  
 from performing the duty of driving a cart or other  
 vehicle when propelled by animal power along the  
 road, I am not prepared in this case to decide. The  
 Act has not expressly specified the age under which a person  
 shall not be permitted to perform the duties in question,  
 and whether by a process of reasoning the provision in  
 the 99th section of the Act of Will. IV. restricting the  
 age of a person who shall be entitled to drive a cart  
 upon turnpike roads is to be imported into this statute  
 and to be applied to locomotives, is a question which I  
 do not think we need to determine in this case.

I should therefore suggest that your Lordships, without determining any question of the law, should decline to interfere with the conviction here complained of.

LORD CRAIGHILL.—I am of the same opinion. It is not necessary to decide the abstract question whether one of the three persons employed to conduct a locomotive on foot must be over four years of age, because the Justices have proceeded merely upon the construction of the Act of Parliament, but upon evidence, in finding that the employment of this capacity of a boy of thirteen on the occasion was a compliance with the requirements of the Act 28 & 29 Vict., c. 83, as amended by 41 and 42 Vict., c. 13. But were it necessary to deal with the general question whether a boy of thirteen could competently, in terms of the provisions of the statutes, perform the duties

question, I should be influenced by the analogy of the provisions with regard to vehicles drawn by animal power on turnpike roads. The statutes do not seem to make any distinction in reference to this matter between locomotives and such vehicles. And in the Act no distinction is made in the qualifications of the persons who are to drive or conduct locomotives on the public road, according as they are employed to drive the locomotive or to accompany it on foot. It rather appears to me that the implication is that any one of the three persons is to be entitled and fit to do any of the duties.

LORD JUSTICE-CLERK.—I entirely concur. I hold a very strong opinion in favour of the action of the Justices in this Case.

The following was the Interlocutor:—

*‘Edinburgh, 6th December 1882.—Having considered this Case, and heard Counsel for the parties, Dismiss the appeal: Find the respondent entitled to expenses, which modify to seven guineas, for which and one guinea as the dues of extract, decern against the appellant.’*

Agent for the Appellant—W. P. ANDERSON, S.S.C.

Agent for the Respondent—PARTY.

---

Present,

LORDS YOUNG and CRAIGHILL and ADAM.

EDWARD M'LEAN, Suspender.

AGAINST

ROBERT DOUGLAS MURDOCH, Respondent.

COLLECTING ALMS BY FRAUD—BEGGING BY MEANS OF FALSE PRETENCES—STATUTE 5 GEO. IV., c. 83 (1824), SECS. 3 AND 4 (Act for the Punishment of Rogues and Vagabonds)—ROGUE AND VAGABOND—STATUTE 34 AND 35 VIC., c. 112, SEC. 15 (Prevention of Crimes Act, 1871).—Held in a suspension of a conviction upon a complaint for a contravention of section 4 of 5 Geo. IV., c. 83, ‘An Act for the punish-

1882.

No. 20.  
Smith  
v.  
Wood.

High Court,  
Dec. 6.

Appeal.



ment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' as amended and extended to Scotland by section 15 of 'The Prevention of Crimes Act, 1871,' that the whole of the provisions in said 4th section were extended to Scotland by the said 15th section, and not merely the clause in the former section which was amended by the latter, that the whole section being therefore in force in Scotland, the suspender was rightly convicted and sentenced upon the said complaint before a Sheriff of the offence of gathering or collecting alms under false pretences, and the Bill refused accordingly.

1882. THIS was a Bill at the instance of EDWARD M'LEAN a vagrant, and lately prisoner at Ayr, for suspension of a conviction and sentence pronounced by one of the Sheriff-Substitutes of the County of Ayr (W. A. O. Paterson, Advocate), upon a charge in a complaint under the Summary Jurisdiction (Scotland) Acts, 186 and 1881, at the instance of the respondent, ROBERT DOUGLAS MURDOCH, Procurator-Fiscal for said Court setting forth—

No. 21.  
M'Lean  
v.  
Murdoch.  
High Court,  
Dec. 22.  
Suspension.

That Edward M'Lean, vagrant, has contravened the fourth section of the Act 5 George IV., chapter eighty-three, intituled, 'An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' as amended and extended to Scotland by 'The Prevention of Crimes Act, 1871,' in so far as the said Edward M'Lean did, on the 12th day of August 1882, or about that time, go about the town of Cumnock, in the county of Ayr, as a gatherer or collector of alms, or endeavouring to procure charitable contributions from the persons after named, or one or more of them, and at or near the places after mentioned, under the false and fraudulent pretence that he was blind and newly out of infirmity, or under some similar false and fraudulent pretence, to the complainer unknown, viz., from :—[There was then set forth the names and designations of nine persons mostly residing in the village of Cumnock, with the places in said village at which they were asked for charity];—whereby the said Edward M'Lean is liable to be committed to the House of Correction, being the Prison of Ayr, there to be kept to hard labour for any time not exceeding three calendar months.

When brought before the Sheriff on the above complaint and upon the objections to the relevancy after mentioned being taken on his behalf and repelled M'Lean pleaded guilty, and the sentence complained of was

of, sentencing him to fourteen days imprisonment with hard labour, was pronounced.<sup>1</sup>

1882.

No. 21.  
M'Leanv.  
Murdoch.High Court  
Dec. 22.

Suspension.

<sup>1</sup> The following note was added by the Sheriff-Substitute to the Interlocutor finding the libel relevant:—

*Note.*—The charge here libelled is 'going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions under a false and fraudulent pretence,' one of the statutory offences enumerated in section 4 of 5 Geo. IV., c. 83. The determination of the relevancy of this statutory charge raises a question of considerable general importance and much difficulty. Are the provisions of the fourth section of 5 Geo. IV., caput 83, in force in Scotland, and can the offences therein enumerated be criminally prosecuted here? The fifteenth section of the Prevention of Crimes Act, 1871 (34 and 35 Vic., cap. 112), recites and amends one of the provisions of the fourth section of the Act 5 Geo. IV., cap. 83, and enacts that 'the provisions of the said section, as amended by this section, shall be in force in Scotland.'

There is no intrinsic ambiguity in the language of this fifteenth section. While it narrates that, by the fourth section of the Act of Geo. IV., 'it is among other things provided that every suspected person,' &c., and refers to the portion of the section of Geo. IV. to be amended in the singular, as 'the said provision,' it expressly declares that 'the provisions of the said section, as amended by this section, shall be in force in Scotland.'

The difficulty arises not so much from the language used in the fifteenth section of the Prevention of Crimes Act, as from a consideration of the fourth section of the Act of Geo. IV., which enumerates a variety of offences, rendering the offender liable to be punished as a rogue and vagabond. The provisions as to the offences first and last enumerated in the fourth section of the Act of Geo. IV., would appear not to have application to Scotland; and the inference attempted to be deduced from this is, that the provisions of this fourth section not being as a whole applicable to Scotland, the fifteenth section of the Prevention of Crimes Act must be held to import into the law of Scotland only the special provision of the fourth section of the Act of Geo. IV., which is amended, and the words, 'the provisions of the said section,' ought to be read as meaning the above recited provision as amended.

Such a construction would be contrary to the express language of the statute, and in violation of the general rule, *a verbis legis non est recedendum*. I do not feel forced to this construction, which is opposed to the ordinary meaning of the language used in the fifteenth section, because I do not think it necessarily results from certain of the provisions which are declared to be in force in Scotland, being

1882.

No. 21.

M'Lean

v.

Murdoch.

High Court,  
Dec. 22.

Suspension.

It was objected before the Sheriff and pleaded in the Bill—

1. The charge being founded on a statute which, in so far as regards the said charge, is not in force in Scotland, is irrelevant.

2. No relevant charge of contravention of the Acts founded on being set forth in the complaint, the conviction and sentence were incompetent, and should be suspended.

3. In the circumstances set forth, the complainer is entitled to suspension as craved, with expenses.

GUTHRIE, for the suspender.—The statute 5 Geo. IV., c. 83, in its fourth section, provides in thirteen different clauses for a number of offences and their mode of punishment, and the question raised by the present Bill is whether the 7th clause of that section<sup>1</sup>—the clause under

---

inapplicable to Scotland, that the provisions, so far as applicable, should not be operative.

I am therefore of opinion that the provisions of the fourth section of the Act of Geo. IV., so far as applicable to Scotland, including the provision under which the present complaint is brought, are in force in Scotland; and that the offence libelled in the complaint subjects the offender to criminal prosecution in this country.

(Initialed) W. A. O. P.

<sup>1</sup> Statute 5 Geo. IV., c. 83 (An Act for the punishment of idle and disorderly persons, and rogues, and vagabonds in that part of Great Britain called England).

The first and second sections are repealed by the Statute Law Revision Act, 1873.

<sup>1</sup> Section 3.—‘And be it further enacted that every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place; every person returning to, and becoming chargeable in, any parish, township, or place from whence he or she shall have been legally removed by order of two Justices of the Peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township or place, thereby acknowledging him or her to be settled in such other parish, township or place; every petty chapman or pedlar wandering abroad and trading, without being duly

which the suspender was convicted — which provides against the gathering or collecting of alms under false and fraudulent pretences, is in force in Scotland by being

1882.

No. 21.  
M'Lean  
v.  
Murdoch.

licensed, or otherwise authorised by law ; every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner ; and every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do, shall be deemed an idle and disorderly person within the true intent and meaning of this Act ; and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month.'

High Court,  
Dec. 22.

Suspension.

**Section 4.**—'And be it further enacted, that every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person ; every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects ; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself ; every person wilfully exposing to view, in any street, road, highway or public place, any obscene print, picture or other indecent exhibition ; every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female ; every person wandering abroad and endeavouring, by the exposure of wounds or deformities to obtain or gather alms ; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence ; every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township or place ; every person playing or betting in any street, road, highway or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance ; every person having in his or her custody or possession any pick-lock key, crow, jack, bit or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable or outbuilding, or being armed with any gun, pistol, hanger,

1882. incorporated with the Prevention of Crimes Act, 1871,  
 No. 21. by section 15 thereof. [Reads section 15.<sup>1</sup>] We con-  
 M'Lean tend for the suspender that section 15 of the Crimes  
 r.  
 Murdoch.

High Court,  
 Dec. 22.  
 ————  
 Suspension.

cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act; every person being found in or upon any dwelling-house, warehouse, coach-house, stable or outhouse, or in any enclosed yard, garden or area, for any unlawful purpose; every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, *or any street, highway or place adjacent, with intent to commit felony*; and every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months,' &c.

The 22d section declares that the Act is not to extend to Scotland or Ireland.

<sup>1</sup> Statute 34 and 35 Vict., c. 112 (Prevention of Crimes Act, 1871), Section 15.—‘Whereas, by the fourth section of the Act passed in the fifth year of the reign of George IV., chapter 83, intituled “An Act for the punishment of idle and disorderly persons, and rogues and vagabonds, in that part of Great Britain called England,” it is, amongst other things, provided that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison with hard labour for any time not exceeding three calendar months: and whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the intent to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words “highway or place adjacent” there were inserted the words, “or any highway or any place adjacent to a street or highway;” and, secondly, that it

Act does not incorporate the whole clauses of the said 4th section of the Act of Geo. IV., but only the clause which is specifically referred to and amended thereby, viz., *clause 12*. The opposite contention, insisted in for the Crown, goes, we contend, too far. In construing section 15, regard must be had to the purpose of the Prevention of Crimes Act, which is the prevention of crimes, and not the fixing of punishments for specific offences; whereas the purpose of the Act of Geo. IV. is the ascertainment of the punishment for the specific offences mentioned in it. The offence which was the subject of the amending portion of the 15th section, viz., the case of suspected persons or reputed thieves frequenting places of resort with intent to commit a felony, is an offence clearly within the scope of the Prevention of Crimes Act, whereas many of the other offences set forth in the 4th section of the Act of Geo. IV. are not, and are crimes in Scotland already. The presumption, therefore, we submit is that it was not the intention of the legislature by that section to extend to Scotland the whole provisions in section 4, but only the particular provision, in order to amend which section 15 was framed. No doubt, after amending clause 12 of said section 4, section 15 adds, 'and the provisions of the said section, as amended by this section, shall be in force in Scotland'; but that is clearly not for the purpose of

1882.

No. 21.  
M'Lean  
v.  
Murdoch.

High Court,  
Dec. 22.

Suspension

---

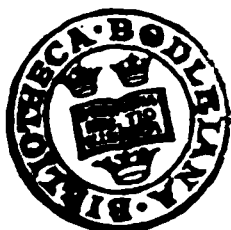
proving the intent to commit a felony it shall not be necessary to shew that the person suspected was guilty of any particular act or acts tending to shew his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the Justice of the Peace or Court before whom or which he is brought, it appears to such Justice or Court that his intent was to commit a felony; *and the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland.* For the purposes of this section, in Scotland the word "felony" shall mean any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing.'



1882. incorporating the whole provisions of section 4, but only  
 No. 21. the 12th—the amended clause ; for the section concludes  
 M'Lean by declaring what shall be the meaning in Scotland of  
 v. the word 'felony' ; and that word does not occur else-  
 Murdoch. where in section 4 than in the amended clause. Further,  
 High Court, the provisions as to the offences first and last enumerated  
 Dec. 22. in section 4 are such as have no application to Scotland  
 Suspension. [reads], and they also refer back to the previous section  
 (section 3), while there is nothing in the Prevention of  
 Crimes Act to connect Scotland with that section, which  
 could not be made applicable to Scotland in such an  
 indirect manner.

LORD YOUNG.—If the whole of section 4 of the Act of Geo. IV. applies to Scotland, we must find out its meaning, whether, in our endeavour to do so, we have to refer to section 3 or not.

GUTHRIE, for the suspender. — The 15th section is plainly capable of construction. It may mean either that the whole 4th section as amended is to be in force in Scotland, or that the section, 'in so far as amended,' is to be in force in Scotland. The second of these interpretations is, we contend, the sound one. The offences provided for in section 4 being already offences by the law of Scotland, it was unnecessary to extend to this country the provisions in regard to them in the 4th section : whereas the persons provided for in the amended clause of that section are just the class of persons to which the Prevention of Crimes Act applies, viz., suspected persons and reputed thieves frequenting places of resort with intent to commit a felony. The presumption, therefore, is that it was only the amended clause that was intended to be extended to Scotland by section 15 of the Prevention of Crimes Act, and that it was not intended to interfere with the established practice in Scotland regarding the other offences enumerated in section 4. *William Cox*, Dundee, April 23, 1872, Couper, vol. ii. p. 229 ; *Peter Davidson and others*, High Court, May 27, 1872, Couper, vol. ii. p. 278 ;





*James Kelly*, High Court, June 24, 1872, Couper, vol. 1882.  
 ii. p. 310; Dwarris on Statutes, p. 602; Wilberforce's  
 Statute Law, p. 187. The complaint therefore having  
 been brought, and the conviction and sentence having been  
 pronounced under a clause of section 4 of the Act of  
 Geo. IV., which does not extend to Scotland, the Bill  
 ought to be sustained and the conviction set aside.

No. 21.  
 M'Lean  
 v.  
 Murdoch.  
 High Court,  
 Dec. 22.  
 Suspension.

BRAND, for the respondent.—In considering the provisions in these sections, regard must be had to the whole scope and purpose of each section. We contend that the whole 4th section of the Act of Geo. IV., as amended by sections 15 of the Prevention of Crimes Act, is by that section declared to be in force in Scotland. There is nothing repugnant to the law of Scotland in the provisions in section 4 of the Act of Geo. IV. After amending clause 12 of that section, section 15 of the Prevention of Crimes Act enacts: 'and the provisions of the said section, as amended by this section, shall be in force in Scotland.' The word '*provisions*,' being in the plural, the plain and literal meaning of the words is that the whole provisions in section 4 are thereby extended to this country. If that word had been in the singular the enactment would have extended clause 4 to this country without its being amended, which could never be contended to have been the intention of the Legislature. The intention was to extend the whole section as amended; and accordingly the 'Statute Law Revision Act, 1873,' while it repeals sections 1 and 2 of the Act of Geo. IV., leaves the rest of the Statute, including sections 3 and 4, unrepealed. The offence, also, of which the suspender was convicted, is not an offence which can be tried in this way by the law of Scotland. A minor offence of attempting to collect alms by means of false pretences could not be prosecuted in Scotland under a charge of falsehood, fraud, and wilful imposition. Before the passing of the Prevention of Crimes Act there was no machinery provided in Scotland which enabled prosecutions to be brought for attempts to commit petty

1882.  
 No. 21.  
 M'Lean  
 v.  
 Murdoch.  
 High Court,  
 Dec. 22.  
 Suspension.

frauds of this description. Prior to the passing of the General Police and Improvement (Scotland) Act, 1862, there existed a number of offences, such as those specified in this 4th section of 5 Geo. IV., c. 83, for the prosecution of which there was no machinery provided ; and at the present day, although the Police Act has provided for the prosecution of some of these, but for the enactment in this 15th section of the Prevention of Crimes Act these offences could not be prosecuted for in places where the Police Act has not been adopted. It was for the purpose of remedying this state of matters that the 15th section of the Prevention of Crimes Act, 1871, enacted that the provisions in section 4 of the Act of Geo. IV. shall be in force in Scotland. And the intention was, as is the plain meaning of the words themselves, thereby to extend to Scotland the whole provisions contained in said 4th section. The Bill ought therefore to be dismissed.

LORD CRAIGHILL.—The suspender here complains of a conviction by the Sheriff of Ayrshire, whereby he was found guilty, under the 4th section of 5th Geo. IV., c. 83, said to be applied to Scotland by section 15 of the Prevention of Crimes Act of 1871, of ‘going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions under a false and fraudulent pretence.’ The ground of the appeal is that what was charged against the appellant is not an offence in Scotland, in respect the relative provision of section 4 of the firstnamed statute has not been applied to Scotland,—the only provision of that section which has been applied, as the appellant contends, being that which is quoted in and amended by section 15 of the Prevention of Crimes Act. The point for decision therefore is, whether the whole of section 4 of 5 Geo. IV., c. 83, or only one provision, of the contravention of which the appellant has not been found guilty, has been applied to Scotland.

The Sheriff has proceeded on the former view, and I concur in his judgment.

The language of section 15 of the Prevention of Crimes

Act appears to me to be clear and unambiguous. Had it been otherwise we might have been influenced by probabilities or presumptions as to what was intended, but the language being plain we must take that which is the natural and the ordinary meaning of the words employed to have been purposed and accomplished. The scheme of the 15th section is this : The provision to be amended is recited, and then the amendment upon it is specified and enacted. Following upon this come the words—‘And the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland.’ In a word, we have first the amendment of the clause, and next the extension of the clause, as amended, to Scotland and Ireland, which is the result at which the Sheriff arrived. The Case of the appellant presented to us was that the words ‘as amended’ should be read as equivalent to the words ‘so far as amended’; and were this view to be adopted, the result would be the suspender’s conclusion. But I am of opinion, as already explained, that the proposed interpolation is inadmissible, because, in the first place, the language of the clause as it stands is unambiguous; in the second place, because the introduction of the words ‘so far’ would not be to interpret but to alter the clause; and, in the third place, there is nothing in the context which justifies the assumption that the appellant’s reading of the clause was that which was intended by the enactment as expressed by the statute. For these reasons, I propose to your Lordships that this appeal should be dismissed.

LORD ADAM.—It seems that the Act 5 Geo. IV., cap. 83, which, previous to the Prevention of Crimes Act, 1871, did not apply to Scotland, sets forth in its 3d section a number of offences for which the offenders are to be deemed idle and disorderly persons, and are to be imprisoned and kept to hard labour for a period not exceeding one calendar month. Then the 4th section of the same Act of Geo. IV. begins by setting forth ‘that every person committing any of the offences hereinbefore

1882.

No. 21.  
M’Lean  
v.

Murdoch.

High Court,  
Dec. 22.

Suspension.

1882. mentioned, after having been convicted as an idle a  
No. 21. disorderly person,' and every person committing any c  
M'Lean of twelve other sorts of offences, is to be deemed a rog  
v. and a vagabond within the meaning of the Act, and is  
Murdoch. be imprisoned and kept to hard labour for a period 1  
High Court, exceeding three calendar months. Among these otl  
Dec. 22. offences in this 4th section, and about the middle of t  
Suspension. section, we find the one of which, as I understand, t  
present appellant has been convicted. It is in the  
terms,—'Every person going about as a gatherer  
collector of alms, or endeavouring to procure charital  
contributions of any nature or kind, under any false  
fraudulent pretence.' Then going on to near the end  
the section we find another offence, which is described  
these terms,—'Every suspected person, or reputed thi  
frequenting any river, canal, or navigable stream, do  
or basin, or any quay, wharf, or warehouse, near or  
joining thereto, or any street, highway, or avenue leadi  
thereto, or any place of public resort, or any aven  
leading thereto, or any street, highway or place adjace  
with intent to commit felony,' shall be regarded a  
punished in the way I have already mentioned. No  
it was thought advisable to alter and amend this l  
provision of the 4th section, and accordingly, by t  
15th section of the Prevention of Crimes Act, 1871, th  
was, in the first place, a more limited meaning given  
the provision, it being declared that the section shou  
be 'construed as if, instead of the words "highway  
place adjacent" there were inserted the words "or a  
highway or place adjacent to any street or highway;  
and, in the second place, there was an alteration ma  
in the character of the evidence necessary to prove th  
intent to commit a felony. Then, after making the  
changes, the section goes on to enact that 'the pr  
visions of the said section, as amended by this sectio  
shall be in force in Scotland and Ireland,' and conclud  
by providing that in Scotland the term 'felony' sh  
mean certain crimes which are specified.

Now, *prima facie*, it appears to me that, according to the ordinary use of language, the effect of the provision of the 15th section of the Prevention of Crimes Act, which I have last quoted, is to introduce the whole of the 4th section of the Act of Geo. IV. into Scotland and Ireland. I quite admit that the words are capable of construction, and, if it had appeared that there was anything in the rest of the section wholly repugnant to the principles of Scotch law, I am far from saying that the words are incapable of receiving another interpretation; but when I find that all the other provisions of the 4th section deal with offences of the same class as that which is admittedly introduced into Scotland, I can see no reason for not giving the 15th section, what I regard as, its natural meaning. I therefore think that the Sheriff-Substitute was right, and that the conviction must be affirmed.

LORD YOUNG.—I am of the same opinion. The language which we have to construe is this—‘And the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland;’ and the question is, Do the words ‘provisions of the said section’ refer to the whole of the provisions of the 4th section of the Act of Geo. IV., or to one out of the thirteen?—for there appear to be thirteen in all. Now, *prima facie*, the words mean the whole provisions; but if it had appeared by reference to the whole of clause 15 of the Act of 1871, where the words occur, that the intention of the Legislature, as seen from the terms and scope of the whole clause, was clearly to extend to Scotland and Ireland only one of these provisions, I should not have felt myself prevented from giving effect to this plain intention by any difficulty I might find in the words. But I am not satisfied that it was clearly the intention of the Legislature to extend one only of the numerous provisions contained in section 15 of the Act of Geo. IV. The matter may be more or less doubtful,—and I think that it may fairly be questioned

1882.

No. 21.

M'Lean

v.

Murdoch.

High Court,  
Dec. 22

Suspension.

1882.

No. 21.

M'Lean  
v.  
Murdoch.High Court,  
Dec. 22.

Suspension.

what the Legislature intended,—but it is not sufficiently doubtful to entitle the Court to resist the words as used according to their ordinary plain meaning. I therefore agree with both your Lordships that the appeal should be dismissed.

The following was the Interlocutor:—

‘*Edinburgh, 28th December 1882.*—The Lords Commissioners of Justiciary having considered this Bill and heard Counsel for the parties, Refuse the Bill and decern.’

Agents for the Suspender—Messrs STEWART, GELLATLY & CAMPBELL, S.S.C.

Agent for the Respondent—CROWN AGENT.

## WEST CIRCUIT.

GLASGOW.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE—*R. V. Campbell, A.-D.*

AGAINST

PATRICK O'CONNOR—*Rose.*

PLEA IN BAR OF TRIAL—RES JUDICATA—THOLING AN ASSIZE—ASSAULT—MURDER.—Held by Lord Young (following the case of *Isabella Cobb or Fairweather*, High Court, 21st November 1836, Swinton, Vol. I., pp. 176, 227, and 354) that a person convicted of assault may subsequently be tried for murder on the supervening death of the person injured by the assault.

No. 22.  
Patrick  
O'Connor.

Glasgow,  
Dec. 27.

Murder.

ON 27th December 1882 at the Circuit Court at Glasgow, before Lord Young, Patrick O'Connor was charged with murder 'in so far as on the 3d day of November 1882, or on one or other of the days of that month, or of October immediately preceding, in or near Tobago Street, Greenock, you, the said Patrick O'Connor, did wickedly and feloniously attack and assault the now deceased Henry Ferguson Welsh, mason, then residing in or near Prospecthill Street, Greenock, and

did with a walking stick, or other similar stick, strike him several, or one or more, severe blows on or about the head and face, and knock him to the ground, by all which or part thereof the said Henry Ferguson Welsh was mortally injured, and he in consequence died on or about the 11th day of November, and was thus murdered by you the said Patrick O'Connor.'

1882.

No. 22.  
Patrick  
O'Connor.Glasgow,  
Dec. 27.

Murder.

O'Connor pleaded in bar of trial that he had already tholed an assize, in respect that he had on 4th November been convicted in the Police Court of Greenock, and sentenced to thirty days' imprisonment for the same act of assault which was now alleged to have resulted in the death of Welsh. He stated further that he had served his full term of imprisonment for this assault, and that he had not been charged with the murder until 4th December.

The Advocate-depute admitted that this was an accurate account of the Police Court proceedings, but contended that they did not support the plea in bar founded on.

ROSE contended for the panel ;—Where there was no collusion between the prosecutor and the accused, the same *species facti* could not be made the subject of more than one regular trial. That principle applied here. It would no doubt be argued that the case of *Isabella Cobb or Fairweather*, High Court, April 14, June 6, and Nov. 21, 1836, Swint. vol. i. p. 176, 227, and 354, and Bell's Notes, p. 229 ; and also the cases of *John Stevens*, Glasgow, Jan. 11, 1850, J. Shaw, 287 ; and *James Stewart*, Ayr, Sept. 11, 1866, 5 Irv. 310, which proceeded on the authority of *Cobb's* case, settled that the principle did not apply to circumstances like the present. But *Cobb's* case was different in more than one respect from the present. There, in the Police Court, there had been no charge of serious injury, and no medical evidence, as there had been here. Then again the deed in *Cobb's* case was said to have been committed with a different kind of instrument in the second trial from



1882.  
 No. 22.  
 Patrick  
 O'Connor.  
 Glasgow,  
 Dec. 27.  
 Murder.

that which had been libelled in the Police Court trial: here the instrument was the same. That might be said to constitute a difference in the *species facti* in *Cobb's* case. Further, the prisoner in *Cobb's* case had been acquitted in the Police Court; here he had been convicted, and had suffered the full term of his imprisonment—most of it after the death of the man assaulted. Then the Judges in *Cobb's* case were equally divided in opinion, though technically there was a majority against the prisoner, as the Lord Justice-Clerk had no vote. That shewed how much there was to be said on either side. Even of the majority of the Court, however, only one Judge, Lord Mackenzie, went on the broad ground that, as, at the time of the first trial, death had not taken place, the *res gestæ* had not been completed, and consequently that the panel had not tholed an assize. But, to look at the question on principle, that was an erroneous ground of judgment. The *species facti* here was the same as it had been at the time of the Police Court trial—so far at least as the prisoner's voluntary agency was concerned. He had remained entirely passive. The death of Welsh was not, in that sense, a new fact, it was merely a new inference from the same facts. That was to say, the Crown were doing nothing more than changing the denomination of the crime, which was incompetent. Hume, vol. ii. 465; *Isabella Cobb*, Lord Medwyn at Swin. vol. i. 391. Could the prosecutor have gone on with the Police Court case after the death of the person assaulted, and then proceeded with the charge of murder? Clearly not. But what difference in principle was there between that and what he was now attempting to do. The prisoner was not to suffer from the ignorance or the undue haste of the prosecutor. Alison, vol. ii. p. 616; *Robertson*, May 5, 1832, Deas and And., vol. v. p. 261, and Alison, vol. ii. p. 616.

BRAND, A.-D., replied that the rule was settled by — *Cobb's* case. There was nothing here approaching to—

undue haste or negligence on the part of the police authorities. The police surgeon had reported that the injuries were not dangerous to life, and Welsh himself had been a witness, and seemed to make little of his injuries. But erysipelas had supervened; and was the apparently perfectly proper action of the police authorities, conducted in perfect good faith, to bar the present trial?

1882.

---

 No. 22.  
 Patrick  
 O'Connor.

---

 Glasgow,  
 Dec. 27.

---

 Murder.

LORD YOUNG.—I think that this question is settled by the judgment in the case of *Cobb*. The judgment in that case was no doubt carried by a technical rule in a Court of six Judges who were equally divided in opinion, and it must therefore be considered that the question which was so decided was a doubtful and difficult one. It was, however, decided upon Informations, and the judgment, as far as I know, has been followed in practice ever since. The rule which the case of *Cobb* settled is this, that if a person is indicted for murder he shall not be entitled to plead *res judicata*,—or, as the old expression is, that he has already tholed or suffered an assize,—in respect that he has been already tried, and either acquitted or convicted, in an inferior Court, or even in a superior Court, for having assaulted the individual with whose murder he is charged, and although the murder is alleged to have been the result of the very assault of which he was either acquitted or convicted. The death of the victim is held to change the character of the offence, so that it is fitting that it should again be inquired into without bar arising from the previous proceedings. As the learned counsel for the panel observed, there is a great deal to be said on both sides, and so worthy of consideration is the question that the Judges in *Cobb's* case were equally divided in opinion; but in such a matter it is of some consequence to have a settled rule; the rule was then settled; it has since been followed, and I follow it now.

The panel pleaded not guilty, but, after some evidence

1882. had been led for the Crown, pleaded guilty of culpable homicide.

No. 22.  
Patrick  
O'Connor.

Glasgow,  
Dec. 27.

Murder.

The Advocate-depute accepted the plea, and the prisoner was sentenced to five years' penal servitude.

Agents for the Panel—J. C. SMITH, MACDONALL, & CRAWFORD,  
Writers, Greenock.

## HIGH COURT.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

ROBERT PRENTICE, Suspender—*M'Kechnie*.

AGAINST

THOMAS LINTON, Respondent—*Mackintosh*.

BROTHEL—STATUTE 42 AND 43 VIC., C. CXXXII., SECS. 258, 259 (Edinburgh Municipal and Police Act, 1879)—HARBOURING PROSTITUTES—KEEPING BROTHEL.—Held that it was unnecessary, in a conviction following upon a complaint which charged the two offences under section 258 of the Edinburgh Municipal and Police Act, 1879, of keeping and managing a brothel, and of knowingly harbouring prostitutes, to find the accused guilty of each offence by separate findings, and in the sentence to separate the amount of penalty applicable to each; and a conviction following upon such a complaint sustained, which found the complaint proved and sentenced to a *cumulo* penalty with imprisonment for a period mentioned until said fine be paid.

1883.

No. 23.  
Prentice  
v.  
Linton.

High Court,  
Feb. 7.

Suspension.

THIS was a Bill of Suspension at the instance of ROBERT PRENTICE, who was convicted before the Edinburgh Police Court, under section 278 of the Edinburgh Municipal and Police Act, 1879, and sentenced to pay a fine of £15 with imprisonment for forty days until paid, upon a complaint at the instance of THOMAS LINTON, Procurator-Fiscal of said Court, which charged an offence under said section of said Act.

IN SO FAR AS on and since the eighteenth day of August 1882 years, but more particularly upon [there were eight dates specified], or upon one or more of said days, the said accused did keep and manage a Brothel in High Street, Edinburgh, and did knowingly harbour in

the said brothel, for the purpose of prostitution, the prostitutes after-mentioned, *videlicet* [here followed ten names], or one or more of them, and such offence is the first offence, &c.

1883.

No. 23.  
Prentice  
v.  
Linton.

High Court,  
Feb. 7.

Suspension.

M'KECHNIE, for the suspender, objected that this complaint and the conviction thereon are inconsistent with the statute, and incompetent. The complaint charges two offences under the section libelled, sect. 278 of the Edinburgh Municipal and Police Act, 1879, viz., that of the dates libelled, the suspender did keep and manage a brothel; and secondly, that of said dates he knowingly harboured certain prostitutes named. These are distinct offences in terms of said 278th section, and there is this important distinction in regard to the former, viz., that by the following section of the statute, section 279, the further consequence is provided that the conviction of a tenant of any house or building under the provisions of the Act, as to keeping of brothels shall, *ipso facto*, void and terminate any lease or any arrangement to let such house from and after the date of the conviction. The conviction here simply finds the complaint proved, and fines the suspender in £15, with forty days' imprisonment until paid. Our contention is that it was inconsistent with the statute to charge in the same complaint two offences, the punishment for each of which is different and capable of being separated.

The LORD JUSTICE-CLERK.—You are found guilty of both offences, and fined for both. Wherein lies the incompetency, I cannot see.

M'KECHNIE, for the suspender.—The punishment for each of the offences being separable, the conviction ought to have contained a specific finding of guilt applicable to each, also a separation of the penalty.

The LORD JUSTICE-CLERK.—That is quite untenable. There does not seem to me to be any ground for the contention made.

Counsel for the respondent was not called upon.

Lords YOUNG and CRAIGHILL concurred, and the following was the Interlocutor pronounced:—

1883. ' *Edinburgh, 7th February 1883.*—Having considered this Bill, and heard Counsel for the parties, Refuse the Bill, and decern : Find the respondent entitled to expenses, which modify to seven guineas, for which and one guinea as the dues of extract, decern against the complainer.'

No. 23.  
Prentice  
v.  
Linton.  
High Court,  
Feb. 7.  
Suspension.

Counsel for the Suspender—R. A. VEITCH, Solicitor.  
Counsel for the Respondent—Messrs MILLER, ROBSON, & INNES, S.S.C.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

GEORGE BLACK, Suspender—*Lang.*

AGAINST

ROBERT SIMPSON, Respondent—*C. Dickson.*

STATUTE 25TH AND 26TH VIC., c. 101, SECTION 251, SUBSECTION 10 (General Police and Improvement (Scotland) Act, 1862)—OBSTRUCTING STREETS—HACKNEY CARRIAGE—COMPLAINT—OBSTRUCTION—ANNOYANCE, OR DANGER OF PASSENGERS.—Suspension of a conviction and sentence pronounced upon a complaint libelling a contravention of section 251, subsection 10, of the General Police and Improvement (Scotland) Act, 1862, by allowing a horse, yoked to a waggonette, to remain opposite to a house specified longer than was necessary for taking up and letting down passengers, sustained notwithstanding that no objection had been taken to the complaint before the Police Court ; it being held that there was no offence libelled either at common law or under the statute.

No. 24.  
Black  
v.  
Simpson.  
High Court,  
Feb. 7.  
Suspension.

THIS was a suspension at the instance of GEORGE BLACK, carriage - hirer, Largs, of a conviction of 'the contravention charged,' and a sentence in the Police Court there, upon a complaint at the instance of ROBERT SIMPSON, Procurator-Fiscal of said Court, which charged a contravention of the 251st clause of the General Police and Improvement (Scotland) Act, 1872, subsection 10.

IN SO FAR AS, upon the 10th of November 1882, between the hours of 12.45 A.M. and 1.15 P.M., or about that time, on the turnpike road leading from Largs to Fairlie, and at a part of said road in the burgh

of Largs and county of Ayr, opposite that house situated at Spring Gardens, in the parish of Largs and county of Ayr, at that time occupied by F. D. N., at that time residing there, the said George Black did allow a horse, yoked to a waggonette or other spring vehicle, of which he was in charge, to stand longer than was necessary for taking up or putting down passengers, said horse and waggonette being the property of the said George Black.<sup>1</sup>

1883.

No. 24.  
Blackv.  
Simpson.High Court,  
Feb. 7.

Suspension.

In the Bill it was pleaded that the subsection libelled applied to public carriages only, and that the carriage in question was the suspender's private waggonette; second, that it was not stated that the obstruction complained of took place in any public or private street; and third, it was not said that the act was to the obstruction, annoyance, or danger of the residents or passengers.

LANG, for the suspender, pleaded—Neither in the complaint, nor in the conviction, is there any relevant or sufficient averment of an offence; and especially there is no such averment of any offence under section 251 of the General Police Act of 1862—the section libelled. The complaint is brought under subsection 10 of that section, which relates to the obstruction of public thoroughfares, &c., by public carriages, &c. The first part of the section, however, governs all the subsections. It provides that ‘every person who, in any street or private street,

<sup>1</sup> Statute 25 and 26 Vic., c. 101 (General Police and Improvement (Scotland) Act, 1862).

Section 251.—‘Every person who in any “street” or “private street” to the obstruction, annoyance, or danger of the residents or passengers commits any of the following offences shall, on conviction on the evidence of one or more credible witnesses, be liable in a penalty not exceeding forty shillings for each offence, &c. . . . That is to say, subsection 10—Every person who causes any public carriage, sledge, truck, or barrow, with or without horses or any beast of draught or burden, to stand longer than is necessary for loading or unloading goods, or for taking up or setting down passengers (except hackney carriages, and horses or other beasts of draught or burden, standing for hire in any place appointed for that purpose by the Commissioners or other lawful authority); and every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing or wilfully causes any obstruction in any public footpath or other public thoroughfare.’

1883.  
 No. 24.  
 Black  
 v.  
 Simpson.  
 High Court,  
 Feb. 7.  
 Suspension.

to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, &c., &c., that is to say' [reads], and there then follows the subsections declaring the offences, and *inter alia* the tenth [reads]. Now, in the first place, it is not said in the complaint, nor in the conviction, that the carriage in question was a public carriage, whereas the statute applies only to such carriages. In point of fact, although the suspender is a carriage-hirer, the waggonette (the carriage complained of) was his private carriage, being used at the time for the conveyance of some friends. It is also not said that this was a public or private street which was obstructed, nor is it charged that what was done was done 'to the obstruction, annoyance, or danger of the residents or passengers.' There being thus specified in the complaint an innocent act, which becomes an offence only under the statute when done in a public or private street, and when done 'to the obstruction, annoyance, or danger of the residents or passengers,' it follows that, without these qualifications being added, there is no offence libelled either under the statute or at common law, and the suspender has been convicted of what is not an offence. The conviction ought, therefore, to be set aside, and the sentence suspended.

C. DICKSON, for the respondent.—This is an objection against this complaint for defect in form, and which was not stated in the inferior Court; it is therefore contrary to the provisions in section 5 of the Summary Procedure Act, 1864, and comes too late. But, at all events, there is set forth in the complaint sufficient to constitute, by necessary implication, what amounts to the offence in the statute: and where there is merely want of detail or want of specification, and that in a summary complaint, this Court will not interfere to set aside the conviction, more especially where no objection has been taken at the time. Of course where what is charged is not an offence the Court can interfere; but our conten—



tion is that there is here set forth sufficient in this summary complaint to constitute the offence in the statute here libelled.

The Court were of opinion that there was no sufficient averment of an offence in the complaint, and the following was the Interlocutor pronounced :—

*'Edinburgh, 7th February 1883.—Having considered this Bill, and heard Counsel for the parties, pass the Bill, suspend the conviction and sentence complained of simpliciter, and decern : Find the complainer entitled to seven guineas of modified expenses, for which and one guinea as the dues of extract, decern against the respondent.'*

Agent for the Suspender.—JAMES DRUMMOND, W.S.  
Agents for the Respondent.—J. & A. HASTIE, S.S.C.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

THOMAS MURRAY, Appellant—*Johnston*

AGAINST

JOHN M'DOUGALL, Respondent—*J. Campbell Smith.*

**BREACH OF CERTIFICATE—KEEPING OPEN HOUSE—HOTEL—STATUTE 25TH AND 26TH VIC., c. 35 (Public Houses Acts Amendment (Scotland) Act, 1862)—LODGER IN HOTEL—GUEST OF LODGER IN HOTEL—ALTERNATIVE COMPLAINT AND GENERAL CONVICTION.—**  
A conviction set aside on appeal which convicted generally 'of the contravention charged,' upon a complaint which charged an hotel keeper, whose certificate was in the form of Schedule A of the Public Houses Acts Amendment (Scotland) Act, 1862, with breach of certificate by keeping open house, or, alternatively, with permitting or suffering drinking on his premises not for the refreshment of travellers or persons lodging in the hotel. And opinion per the Lord Justice-Clerk and Lord Young, that breach of certificate is not committed by an hotel keeper who supplies whisky to the guest of a lodger in the hotel upon the order of the latter after eleven o'clock, in circumstances which did not infer that the guest had been brought to the hotel for the purpose of evading the statute.

1883.

No. 24.  
Black

v.  
Simpson.

High Court,  
Feb. 7.

Suspension.

1883.  
 No. 25.  
 Murray  
 v.  
 M'Dougall.  
 High Court,  
 Feb. 7.  
 Appeal.

THIS was an appeal under the Summary Prosecutions Appeals Act at the instance of THOMAS MURRAY, hotel keeper, Weighhouse Inn, Kelso, against a conviction and sentence pronounced in the Justice of Peace Court of the county of Roxburgh, at Kelso, upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of JOHN M'DOUGALL, Procurator-Fiscal of said Court.

The Case on appeal set forth that—

The petition or complaint sets forth that the appellant had 'been guilty of an offence within the meaning of the Public-Houses Acts Amendment (Scotland) Act, 1862, and the Acts therein recited, namely, the Acts 9th Geo. IV., cap. 58, and 16 and 17 Vict., cap. 67, or one or more of said Acts, in so far as between the hour of eleven of the clock on the night of Monday, the 20th day of November, and in or about the hour of one of the clock on the morning of Tuesday, the 21st day of November 1882 years, or about that time, the said Thomas Murray, who holds a certificate to keep an inn and hotel at Bridge Street, Kelso, in the parish of Kelso and county of Roxburgh, did keep open house, or permit or suffer drinking on the premises belonging thereto, which was not for the refreshment of travellers, or of persons requiring to lodge in the said house or premises, in contravention or breach of the terms, provisions, and conditions of his said certificate, being an offence within the meaning of the said Act or Acts, or one or more of them; and such offence the first offence,' &c.<sup>1</sup>

It was proved by Alexander Reid and John Sinton, both police constables in Kelso; that about fifteen minutes past eleven o'clock P.M. of the 20th November 1882, they saw John Bell, farmer, Shott Robert Gray, mole-catcher, Caverton Mains, Andrew Brotherston, bird-stuffer, Kelso, and the appellant, standing in Bridge Street Kelso, near or opposite to the appellant's premises; that the same police constables were again in Bridge Street about twelve o'clock thereafter, and hearing persons talking in the Weighhouse Inn, they waited there till about one o'clock on the morning of Tuesday, the

<sup>1</sup> One of the conditions contained in the appellant's certificate, which was in the form of schedule A of the Public Houses Acts Amendment (Scotland) Act, 1862, was, 'That the said Thomas Murray do not keep open house, or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven of the clock at night, of any day, with the exception of refreshment to travellers or to persons requiring to lodge in the said house or premises.'

21st November, when the appellant's door not being locked, they entered his premises, and there found the said John Bell, Robert Gray, and Andrew Brotherston. There were tumblers and glasses in the room, some of them containing whisky and one wine. The officers charged the appellant with a breach of his certificate, whereupon they were informed that Bell and Gray had taken beds there for that night.

1883.

No. 25.  
Murrayv.  
M'Dougall.High Court,  
Feb. 7.

Appeal.

Brotherston proved that he entered the appellant's licensed premises, on the invitation of Mr Bell, about fifteen minutes past eleven, and that he waited there till the police appeared about one o'clock the next morning; that he was supplied with half a glass of whisky by the appellant on the order of Mr Bell.

Bell and Gray were called as witnesses for the appellant, and proved that one of them had taken his bed from the appellant about five o'clock and the other about nine o'clock, of the said 20th November, and that having met Brotherston a few minutes past eleven, Bell invited him to accompany them into the accused's licensed premises, which he did, and where they were supplied each with a half glass of whisky; and that the said officers of police appeared about one o'clock A.M. of the 21st November, when Brotherston left the hotel. Bell and Gray then went to bed in the appellant's licensed premises. Bell's residence is 9 miles from Kelso, Gray's is not so much.

The Justices found the appellant guilty of the contravention charged, and sentenced him to pay five shillings of modified penalty, with thirteen shillings of expenses, or failing payment within fourteen days, to be imprisoned for seven days.

The question of law submitted for the opinion of the High Court was—

Are the facts proved sufficient to constitute an offence within the meaning of the Acts libelled on, and to warrant a conviction against the appellant?

JOHNSTON, for the appellant.—There was here, we contend, upon the facts stated in the Case, no breach of the terms and conditions of the appellant's certificate. The fact of two persons lodging in the appellant's hotel having taken a friend who was not a lodger there into the hotel after eleven o'clock, and of the latter having been supplied with a small quantity of whisky upon the order of one of the lodgers, does not amount to the breach of certificate here charged. *Gemmell v. Fleck*, High Court, Oct. 27, 1882, Couper, vol. v. p. 150. But further

1883.  
 No. 25.  
 Murray  
 v.  
 M'Dougall.  
 High Court,  
 Feb. 7.  
 Appeal.

there are two offences set forth in the complaint, viz., that of keeping open house, and that of permitting or suffering drinking on the premises not for the refreshment of travellers or of persons requiring to lodge in the hotel, and these are charged alternatively, while the conviction is general 'of the contravention charged.' It therefore fails from uncertainty as it does not appear upon the face of it of which of the charges the appellant has been convicted.

J. CAMPBELL SMITH, for the respondent.—The question regarding the form of the conviction is not raised in the Case on appeal. If it is to be held that the charge is alternative, the proper course to be followed is to remit to the Justices to say of which of the offences charged the appellant has been convicted.

LORD YOUNG.—The Justices may reform the Case, but they cannot reform the conviction.

J. CAMPBELL SMITH, for the respondent.—We contend, however, that there are not two separate offences charged. The charge is exegetical, and is that of keeping open house, and which can only be committed either by permitting or suffering drinking on the premises, or by selling or giving out liquor.

The LORD JUSTICE-CLERK.—Keeping open house may be committed otherwise than by permitting or suffering drinking on the premises, or by selling or giving out liquor. It may be committed without either of these offences being committed.

J. CAMPBELL SMITH, for the respondent.—The theory of the enactment in the statute is, we contend, that any one who wants drink after eleven o'clock must drink in his own house, and if a lodger in an hotel takes a guest to the hotel after eleven o'clock, and liquor is supplied, even upon the order of the lodger, and consumed, then drinking on the premises has been permitted or suffered in the sense of the statute. The taking of this guest into the house after eleven o'clock was, in the circumstances, stated a palpable evasion of the statute.

*M'Call v. Wood*, High Court, March 14, 1878, Couper, 1883.  
vol. iv. p. 43.

LORD YOUNG.—I think this conviction cannot stand. It is a paltry case, and I am surprised that the police should have spent so much time and trouble in tracing it out. The facts, as stated to us on the Case, are that two men, of the names of Bell and Gray, who had taken bedrooms in the appellant's inn, about 11 o'clock at night, met a friend named Brotherston, and invited him into the inn to have a talk and half a glass of whisky. He came in, and they had their talk and their whisky. The police having ascertained these facts, the innkeeper was charged, under the Public Houses Acts, with keeping open house. It is said in the complaint that he 'did keep open house, or permit or suffer drinking on the premises belonging thereto which was not for the refreshment of travellers, or of persons requiring to lodge in the said house or premises.' Upon these facts the magistrates convicted the innkeeper generally by finding him guilty 'of the contravention charged.' I am disposed to think that there are two offences charged here alternatively, one being 'keeping open house,' 'permitting or suffering drinking' being the other. I am of opinion that although the charge of 'keeping open house' requires some specification, that may consist in some other circumstances or conduct than supplying drink or suffering drinking, and there is, on the other hand, no doubt that drink may be supplied or drinking permitted after eleven o'clock without keeping open house. 'Keeping open house' is keeping it open as an inn, inviting guests in to partake of its hospitality. If it be proved that the inn or public-house was kept open for the purpose of affording accommodation of the kind to any one of the public after eleven o'clock the offence is committed. But, on the other hand, drink may be supplied after eleven o'clock in contravention of the statute to persons who have come in before eleven, and are there legitimately.

Therefore I think the charge is alternative, and must

No. 25.  
Murray  
v.  
M'Dougall.  
High Court,  
Feb. 7.  
Appeal.

1883.

No. 25.  
Murray  
v.

M'Dougall.

High Court,  
Feb. 7.

Appeal.

be so read, and the conviction must be of one or the other.

But on the facts stated here, I am of opinion that no offence was committed. It was quite right to allow these two persons who had taken beds to come in, and it was quite right to admit their guest with them and to allow him to have this half glass of whisky with them. These things do not constitute the offence of keeping open house and supplying drink to the public, *i.e.*, to any one who is passing, for that is the offence.

Therefore, both in form and in substance, I think the conviction is wrong, and must be set aside.

LORD CRAIGHILL.—I concur in thinking that the sentence complained of ought to be quashed. The ground of my opinion, however, is simply that the charge made against the appellant was alternative, and the judgment was a general conviction. On the other question which has been argued, whether what was done was a contravention of the appellant's certificate, I reserve my opinion. That question appears to me to be important as well as difficult, and as a decision of it is not required, it seems expedient that no judicial opinion upon it should be expressed. I shall only add that the views which have been expressed by Lord Young are not within the literal meaning of the words of the certificate, and are not covered by any decision hitherto pronounced. It may be that the principle recognised in previous decisions, carried to its logical result, would be a ground on which the present sentence ought to be quashed, but there is room for a different opinion, and till it is necessary that the point should be decided, it is better, I think, that a judicial opinion upon it should not be delivered.

LORD JUSTICE-CLERK.—I concur, and substantially upon both the grounds taken by Lord Young, but I prefer to base my judgment upon the former. The form of this conviction is manifestly inaccurate, for it implies that a person cannot keep open house, unless he at the same time commits one or other of the offences of 'per-

mitting or suffering drinking,' or giving out drink for sale. But I am of opinion that the offence of keeping open house may be committed without either of these other offences being committed, and, therefore, I think that there ought to be a precise finding in the conviction whether the offence is the offence of keeping open house merely, or of supplying drink or of permitting drinking in the house. On the other ground, I can see that no doubt an evasion of the law might take place under cover of what I conceive to be a perfectly sound interpretation of the statute ; but here there is no such case of evasion. I do not think that a certificate is infringed by a guest living in the inn giving a friend who is not living there refreshment at his own charges and upon his own order.

The following was the Interlocutor :—

' *Edinburgh, 7th February 1883.*—Having considered this case, and heard counsel for the parties : Answer the question in the Case in the negative : Reverse the determination of the Justices : Find the Appellant entitled to expenses, which modify to seven guineas, for which and one guinea as the dues of extract, decern against the respondent.'

Agent for Appellant—P. ADAIR, S.S.C.

Agent for Respondent—PARTY.

## WESTERN CIRCUIT.

GLASGOW.

Present,

LORD CRAIGHILL.

DALGLISH AND KERR, Appellants—*M'Lennan*.

AGAINST

J. W. ANDERSON, Respondent—*Steele*.

SMALL DEBT COURT—STATUTE 1 VIC., c. 41, SECTIONS 2 AND 31 (Small Debt Act, 1837)—RESTRICTION OF CLAIM—SHERIFF—INCOMPETENCY AND DEFECT OF JURISDICTION.—In an action in the Small Debt Court, libelling on an account amounting in full to

1883.

No. 25.  
Murray  
v.

M'Dougall.

High Court,  
Feb. 7.

Appeal.



more than the statutory limit of £12, the conclusion of the summons was restricted, so as to fall within the limit, and after proof the Sheriff disallowed certain items of the original account, and in decerning deducted the sums so disallowed from the original amount of the account, and not from the sum concluded for. Held on appeal that in thus giving decree for the balance proved to be due, which did not exceed the statutory limit, the Sheriff had not exceeded his powers, and the appeal dismissed.

1883.  
 No. 26.  
 Dalglish and  
 Kerr  
 v.  
 Anderson.  
 Glasgow,  
 Feb. 22.  
 Appeal.

By the Small Debt Act, 1837 (1 Vic., c. 41), sec. 2, it is enacted that 'it shall be lawful for any Sheriff in Scotland within his county to hear, try, and determine in a summary way . . . all civil causes, and all prosecutions for statutory penalties, as well as all maritime civil causes and proceedings that may be competently brought before him, wherein the debt, demand, or penalty in question shall not exceed the value of eight pounds, six shillings and eightpence, sterling (increased to £12 by the Sheriff Court Act, 1853, 16 and 17 Vic., c. 80, sec. 26), exclusive of expenses and fees of extract: Provided always that the pursuer or prosecutor shall in all cases be held to have passed from and abandoned any remaining portion of any debt, demand, or penalty beyond the sum actually concluded for in any such cause or prosecution.'

J. W. ANDERSON, merchant, London, and ANDRE PAUL, writer, Glasgow, his mandatory, sued DALGLISH KERR, Blantyre Works, Blantyre, in the Small Debt Court of Lanarkshire at Hamilton, for the sum of £12 for goods supplied, &c., as per account produced. The account libelled on consisted of six items, five of which referred to furnishings of small individual amount, the sixth being a claim of damages stated at £15, 9s. 8d. The total amount of the account was £27, 14s. 8d., but this bore to be 'restricted to £12.' The defenders denied that any part of the account was due.

A proof was led on 24th October 1882, the result of which was that the Sheriff-Substitute (Birnie) disallowed several of the smaller items, amounting in all to £8, 19s. 3d., but gave decree for £12 in respect of the claim of

£15, 9s. 8d. preferred in name of damages, which he held to be substantiated to the extent of £12 at least. Against this decision the defenders appealed to the Glasgow Circuit Court, on the ground that the Sheriff-Substitute had exceeded the statutory limits of his jurisdiction, and that the judgment was therefore incompetent.

1883.  
 No. 26.  
 Dalglish and  
 Kerr  
 v.  
 Anderson.  
 Glasgow,  
 Feb. 22.  
 Appeal.

M'LENNAN, for the appellants, contended—(1) That the statutory limit of £12 did not merely determine the maximum sum for which the Sheriff could give decree, but applied also to the value of the claims which he was entitled to investigate and exercise his judgment upon; and having disallowed items amounting to £8, 19s. 3d., he could not competently decern for more than a sum of £3, 0s. 9d. (2) The pursuer being held, by restricting his demand to £12, to have passed from and abandoned the remaining portion of his debt, the claims disallowed must be deducted from the existent demand for £12, and not from the non-existent and abandoned balance. (3) It is the duty of a litigant to anticipate the possibility of a defence, and therefore if he chooses to restrict his claim in order to sue by a summary and final procedure, he suffers no injustice in having all competent defences set against his restricted and not against his original demand. (4) The effect of deducting items disallowed from the unrestricted, instead of from the restricted demand, is to leave the defender without compensation or expenses, notwithstanding partial success in his defence. (5) Further, in a case such as the present, where the amount investigated exceeds in reality £25, the principle applied by the Sheriff-Substitute involved the possibility of a final decision affecting a sum which otherwise would admit of appeal on the merits;—had this action been raised for the full amount in the ordinary Sheriff Court, the defenders would have had a right of appeal in respect of the £12 decerned for by the Sheriff-Substitute, his decision as to which they maintained to be wrong on the merits.

1883. Counsel for respondents was not called on.

No. 22.  
Dalglish and  
Kerr  
v.  
Anderson.  
Glasgow,  
Feb. 22.  
Appeal.

LORD CRAIGHILL.—This appeal is from the judgment of the Sheriff-Substitute of Lanarkshire pronounced in the Small Debt Court at Hamilton on a claim by the respondent for £27, 14s. 8d., restricted to £12 in order that it might be brought within the amount recoverable in the Small Debt Court. The ground of appeal is that the Sheriff-Substitute, though upon the proof sums were disallowed, did not deduct them from the £12 and limit his decree to the balance. The Sheriff-Substitute may or may not have erred in point of law in giving judgment for the £12; but it appears to me to be clear enough that there is no appeal from his judgment. Apart from this, and even assuming that there was jurisdiction in the Circuit Court to review his decision I am of opinion that the appeal must be dismissed. The issue which was left to be determined was whether or not £12 were due, and if £12 remained due after sums not established had been disallowed, the Sheriff-Substitute, as I think, was not only entitled but bound to decern for the £12 to which the claim had been restricted. What the practice upon this question has been is in controversy. But what was done on the present occasion by the Sheriff-Substitute appears to me to be within his powers, and cannot be reviewed upon any of the grounds on which a judgment in a Small Debt Court may be submitted for review of the Circuit Court.

The following was the Interlocutor:—

*‘Glasgow, 22nd February 1883.—Having heard Counsel for the parties, Lord Craighill dismisses the appeal and affirms the judgment appealed from: Finds the respondent entitled to expenses, modifies the same to same to four pounds four shillings, for which sum decerns against the appellants.’*

Agents for the Appellants—WILLIAM BROWN & Co., Writers.

Agent for the Respondents—ANDREW PAUL, Writer.

## HIGH COURT.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

WILLIAM M'LEISH, Appellant—*C. Dickson.*

AGAINST

WILLIAM BROWN CRIGHTON AND JOHN CRIGHTON, Respondents—  
*A. J. Young.*

ROAD LOCOMOTIVE—STEAM TRACTION-ENGINE—STATUTE 1 AND 2 WM. IV., c. 43, SECTION 123 (Turnpike Roads (Scotland) Act, 1831)—STATUTE 41 AND 42 VIC., c. 51, SECTIONS 123 and 124 (Roads and Bridges (Scotland) Act, 1878)—STATUTE 28 AND 29 VIC., c. 83, SECTION 6 (Locomotives Act, 1865).—The Roads and Bridges (Scotland) Act, 1878, by section 123 incorporated the 107th section of the General Turnpike Act, 1831, which enacts 'that no person shall hereafter erect any' . . . 'steam-engine' . . . 'within the distance of 100 yards from any part of any turnpike road, under the penalty of £5 for every day such' . . . 'steam-engine' . . . 'shall continue, unless the same shall be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise;' . . . 'provided always that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of any' . . . 'steam-engine' . . . 'in any case where by common law the same shall be a public or private nuisance.'—Held that a contravention of the above enactment had been committed by placing and working a steam traction engine, for the purpose of driving a thrashing mill, within 100 yards of a public road without a sufficient screen.

THIS was an appeal at the instance of WILLIAM M'LEISH, county road clerk for the county of Perth, upon a Case stated under the Summary Prosecutions Appeals Act, against a judgment pronounced by the Sheriff-Substitute at Perth (Barclay), upon a summary complaint at the appellant's instance against the respondents, WILLIAM BROWN CRIGHTON and JOHN CRIGHTON, contractors, residing in said county.

The Case set forth that—

1883.

---

 No. 27.  
 M'Leish  
 v.  
 Crighton.

---

 High Court,  
 March 14.

---

 Appeal.

1883.  
 No. 27.  
 M'Leish  
 v.  
 Crichton.  
 High Court,  
 March 14.  
 Appeal.

This is a cause raised under the Roads and Bridges (Scotland) Act 1878, sections 123 and 124 thereof [see footnote, p. 228], and section incorporated therewith, viz., the 107 section of the Act and 2 William IV., c. 43 (1831), which is in the following words—'And be it enacted that no person shall hereafter *erect* any windmill, watermill, *steam-engine*, or limekiln within the distance of one hundred yards from any part of any turnpike road, under the penalty of Five pounds for every day such windmill, watermill, steam-engine or limekiln shall continue, unless the same shall be so placed and screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise' . . . 'under a penalty not exceeding Five pounds for every day any such nuisance shall continue; provided always that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of a windmill, watermill, steam-engine, &c., in any case where by common law the same shall be a public or private nuisance.'

The appellant, who is clerk of the Road Trustees for the County of Perth, and entitled to prosecute for the recovery of penalties recoverable under the said Roads and Bridges Act, and enactments incorporated therewith, prayed for conviction of the respondents, the said William Brown Crichton and John Crichton, under the said incorporated section, in respect that for one day, between from three in the afternoon of the sixteenth till three in the afternoon of the seventeenth November, Eighteen hundred and eighty-two, the respondents, or one or other of them, caused a traction engine driven by steam, for a thrashing-mill, to be placed or erected within the distance of one hundred yards from the public road leading from Logier village to Weem, and at a part thereof near the farm-house Tighnaster, occupied by James M'Donald, farmer there, in the parish of Logierait and county of Perth, said road being a highway within the meaning of the said 'Roads and Bridges (Scotland) Act, 1878,' said engine not being so placed or screened as to prevent damage or detriment to travellers on said road, by frightening horses or otherwise.

The appellant asked that the accused, or one or other of them, should be found liable in a penalty not exceeding Five pounds for said day during which said traction engine driven by steam continued together with the expenses of process, and failing payment of said penalty and expenses, immediately or within a specified time as the case might be, that they should be found liable to be imprisoned under the provisions of the said 'Roads and Bridges (Scotland) Act 1878,' and 'The Summary Jurisdiction (Scotland) Acts, 1864 and 1881.'

The respondent William Brown Crichton appeared at the trial and pleaded not guilty. The other respondent did not appear.

The facts of the case as proved were that the respondents had their locomotive traction engine driven by steam in operation

tion in the farmyard of Tighnaster on part of two successive days, and during the period and at the place libelled in the complaint, for thrashing the tenant's grain, close on the highway and immediately inside a low wall  $3\frac{1}{2}$  feet high. Almost the whole of the engine was visible from the road, and there was nothing of the nature of a screen between it and the road. Mr Fletcher Menzies of Farleyer, with his servant, passed along the road in his carriage drawn by two horses at the time of the operation. There was more than one man attending to the engine, but it did not appear that anyone was on the road, or that any rendered aid to the horses. The steam was turned off when the carriage was about 40 yards from the engine, but the machinery continued for a time in motion. The horses did not bolt or run away, but hearing the noise they were frightened and increased their speed. No accident occurred, Mr Menzies and his servant being able to curb them without assistance.

After hearing proof the Sheriff-Substitute dismissed the complaint, assolizied the accused from the conclusion thereof, but in respect of the novelty of the case found no expenses due.<sup>1</sup>

1883.

No. 27.

M'Leish

v.

Crighton.

High Court,  
March 14.

Appeal.

<sup>1</sup> The following Notes were added by the Sheriff-Substitute to his judgment:—

*Notes.*—The complaint is founded on the 107th section of the Act 1 and 2 William IV., cap, 43 (1831), in the following words:— [Here followed the section]. The above section and several other sections regarding the economy and police of highways have been transplanted into the Roads and Bridges (Scotland) Act, 1878, but have no further extension or modification than was given to it by the original. The clause, indeed, will be found an exact transcript of similar clauses in more ancient Turnpike Acts. The various sections adopted in the Roads and Bridges Act contain regulations and provisions both for the permanent and temporary police of the highways. This particular clause obviously is intended for permanent and not temporary protection of highways. That the clause was so directed is clear first from the use of the word 'erect' and the character of the erections. No person would ever think of the erection for a day or any definite or limited time of a windmill, watermill, or steam-engine. The concluding portion of the clause provides that even the payment of a high penalty for each day could not be to exempt from the removal of the permanent erection of a private or public nuisance. It is preposterous to suppose that the legislative body in the year 1831 could even have contemplated the use of a locomotive being used for agricultural purposes, any more than they could have conceived the notion of a telephone or the use of electric light.

Before the year 1865 the application of steam to the purposes of agriculture had become to be generally used, and therefore by 28 and 29 Vic., c. 83 (1865), it was found necessary to modify the prohibi-

1883.

—  
No. 27.  
M'Leish  
v.  
Crichton.

The appellant being dissatisfied with the judgment as erroneous in point of law, appealed thereagainst and demanded a Case under the Summary Prosecution Appeals (Scotland) Act, 1875, which was granted.

High Court,  
March 14.  
Appeal.

tion in all statutes which by any interpretation might prevent the use of a locomotive in fields adjoining highways. The following clause was therefore inserted in that statute:—[Here followed section 6 of 28 and 29 Vic., c. 83 (The Locomotives Act, 1865). See footnote, p. 229].

The Consolidated Highway Act for England was the 5 and 6 William IV. (1833). The 70th section is similar to the 107th section of the Act of 1831, applicable to Scotland with the variation that the distance within which a steam-engine may be erected is twenty-five yards instead of one hundred. This explains the reason of the former number being adopted in the Locomotive Act, 1865, above noticed. [The facts as they are stated in the Case on appeal were then set forth.]

In these circumstances the Sheriff-Substitute cannot find grounds for conviction of the accused. Under the statute a party may use a locomotive for ploughing fields up to the very margin of the road, provided similar precautions, as were done in this instance are used. [See Statute 28 and 29 Vic., c. 83, sec. 6 (Locomotives Act, 1865), footnote, p. 229.] If such are permitted for ploughing fields amongst highways, it would be absurd to deny the same liberty for the thrashing of the produce of the fields. The latter act is generally at some certain and fixed spot in the stack-yard, which is usually on the side of a highway. Therefore, to deny the liberty to do this operation would be effectually to deny the use of steam power for the purpose of thrashing grain—an operation which has always been performed by mechanical power, and is much less extensive in its sphere than the operation of ploughing, which may extend for miles adjacent to a highway.

The several statutes appear to contemplate the danger from locomotives or horses because of their visible effects requiring a 'wall, fence, or screen sufficient to conceal or screen the same.' The Sheriff-Substitute humbly conceives that a far greater danger exists from sound than from sight. The unearthly and weird-like sounds proceeding from these moving monsters are more likely to alarm animals than their mere appearance, though by no means very comely. There may be call for further legislation, but the province of a judge or magistrate is only to apply existing statutes, and not to speculate on future arrangements and legislation.

H. B.

Statute 41 and 42 Vic., c. 51 (Roads and Bridges (Scotland) Act, 1878).

Section 123.—[See footnote 3 to the case of *Smith v. Mure Wood*, High Court, December 6, 1882, at p. 188.]



The question of law for the opinion of the High Court of Justiciary was—

Whether the facts as proved infer a contravention of the incorporated clause above quoted?

C. DICKSON, for the appellant.—The question is whether a traction-engine, driven by steam, while in operation on a farmyard thrashing grain, close upon, and quite visible from, a highway, comes within the enactment in section 107 of The General Turnpike Act, 1831, which prohibits the *erection* of a steam-engine

1883.

No. 27.  
M'Leish  
v.  
Crichton.

High Court,  
March 14.

Appeal.

Section 124.—‘All penalties under this Act, or the enactments incorporated herewith or continued in force hereby, may be recovered, together with the expenses of process, at the instance of the procurator-fiscal, or of the clerk of the trustees, or of the clerk of the burgh local authority, as the case may be, upon the testimony of one or more credible witnesses, before the Sheriff or any Justice of the Peace of the county or magistrate of the burgh, as the case may be, in which the same shall have been incurred, under the provisions of the Summary Procedure Act, 1864; and all the jurisdictions, powers, and authorities necessary for this purpose are hereby conferred on Sheriffs and Justices of the Peace and magistrates of burghs, and their decision shall be final, save only that the provisions of the Summary Prosecution Appeals (Scotland) Act, 1875, shall apply to the same.’

Statute 28 and 29 Vic., c. 83 (The Locomotives Act, 1865).

Section 3.—[See footnote to the Case of *Smith v. Mure Wood*, High Court, December 6th 1882, at page 186.]

Section 6.—‘Any provision in any Act contained prohibiting under penalty the erection and use of any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards from any part of any turnpike road, highway, carriageway, or cartway, unless such steam-engine, gin, or other like engine or machinery be within some house or other building, or behind some wall, fence, or screen sufficient to conceal or screen the same from such turnpike road, highway, carriageway, or cartway, shall not extend to prohibit the use of any locomotive steam-engine for the purpose of ploughing within such distance of any such turnpike road, highway, carriageway, or cartway, provided a person shall be stationed in the road and employed to signal the driver when it shall be necessary to stop, and to assist horses, and carriages drawn by horses, passing the same, and provided the driver of the engine do stop in proper time.’

Statute 41 and 42 Vic., c. 58 (The Locomotives Act, 1878).

Section 4.—[See footnote 2 to the Case of *Smith v. Mure Wood*, High Court, December 6, 1882, at p. 187.]

1883.

No. 27.  
M'Leish  
v.  
Crichton.

High Court,  
March 14.

Appeal.

within 100 yards of a turnpike road, without being so screened as to prevent horses being frightened. The Sheriff-Substitute has found that it does not, and has assoilzied the respondent. We contend that his judgment is not well founded. There was here undoubtedly a steam-engine within the prescribed distance from a highway, without any screen and without having any one on the road. The Roads and Bridges Act of 1878, by section 123 incorporated the 107th section of The General Turnpike Act [see footnotes, pp. 228 and 229]; and although it may be said that traction-engines, such as the one here complained of, could not be held to have been in the contemplation of the legislature at the date of the passing of the Act of 1831, the 123d section of the Act of 1878 must have incorporated said 107th section in the view of the existence of steam-engines of that kind. The word 'steam-engine' in the latter section could never be held to include only stationary engines, consistently with the attainment of the object of that enactment. The expression must be held to be used in the sense as it is understood at the present day *Sandys and Mandatory v. Lowden and Rowe*, High Court, Nov. 20, 1874, Couper, vol. iii. p. 43, where a similar principle of construction was given effect to. Lastly, the exception contained in section 6 of The Locomotives Act of 1865 [see footnote, p. 229], applies only to ploughing, and thrashing is not included within it.

A. J. YOUNG, for the respondent.—The offence charged is in section 107 of the General Turnpike Act (1831), and that section, it is true, is incorporated in the Roads and Bridges (Scotland) Act, 1878, but there has not been, we contend, a contravention here such as is struck at by that section. It is clear that what was intended to be struck at was the permanent erection of a stationary steam-engine within the prohibited distance from a highway, and not the bringing of a locomotive engine there for a temporary purpose. The use of the word 'erect' can be referred only to

a fixed engine. Further, the respondent is not charged as having been present on the occasion libelled, or as having directed the engine to be erected at the place in question. The engine was so placed by the directions of the farmer, whose grain was being thrashed. And if the engine was under the charge of the respondent's servant, who placed it contrary to his, the respondent's, orders in a wrong place, he, the master, is not liable for the delict of his servant. *Harrison v. Leaper*, January 25, 1862 (Q. B.), *Law Times*, vol. v., p. 640. It ought to have been averred that the respondent was present on the occasion, and there being no evidence that he was present, the Sheriff was on that ground right in assoilzieing.

LORD CRAIGHILL.—I think that the facts found in this case infer a contravention of the 107th clause of the General Turnpike Act 1 and 2 Will. IV., c. 43, incorporated with the Roads and Bridges (Scotland) Act, 1878. The engine, no doubt, as the Sheriff-Substitute explains, is a travelling engine, taken from place to place, as arranged by the owners with farmers whose grain is to be thrashed, and it is at all times put up or erected only in such a way as is necessary for doing the work undertaken for the particular occasion. But there was on the occasion libelled an erection—such an erection as was necessary for the purpose to be accomplished, and that is all that is required to bring the provisions of the statute into operation. Permanency, or the endurance of the erection for more than a day or a week or a month, is not a statutory condition; it is plain that the end in view would be frustrated were that adopted by the Sheriff-Substitute to be held a true interpretation of the clause in question. He seems to have been influenced by the consideration that by the Act 28 and 29 Vic., c. 83 (1865), toleration is given to a locomotive-engine used in ploughing to plough up to the edge of the road under specified conditions. But this enactment is really an argument, not for, but against,

1863.

No. 27.  
M'Leish  
v.  
Crichton.

High Court,  
March 14.

Appeal.

1883.

No. 27.  
M'Leish  
v.  
Crichton.

High Court,  
March 14.

Appeal.

his decision in the present case. In the first place, there is express statutory authority for such use of locomotive machinery used in ploughing, whereas not only is there no statutory sanction for the use of the respondent engine in the situation in which it was placed, but its use there was a contravention of a statutory prohibition. In the second place, the use of the locomotive-engine for ploughing is authorised only on the condition 'that a person shall be stationed in the road, and employed to signal the driver when it shall be necessary to stop, and to assist horses, and carriages drawn by horses, passing the same.' But no such precaution was observed when the respondent's engine was at work at the time and place libelled in this complaint, no one being on the road to warn or to assist when the thrashing-engine was in motion. This omission, it may be observed, is not the neglect of a statutory precaution. The Act of Parliament in question trusts to other safeguards which were neglected. But the Sheriff-Substitute's analogy fails, and what is presented as a reason for assailing is really a reason pointing to the conclusion that there should have been a conviction. This interpretation of section 107 of the General Turnpike Act, incorporated with the Roads and Bridges (Scotland) Act of 1878, has been adopted by the English Courts in construing a similar clause in the English Road Acts. Diversity of decision on this subject would be a reasonable cause of regret, but fortunately the Supreme Courts in the two countries are of one mind as to the import of the enactment now submitted to the consideration of the Court.

Counsel for the respondents asked us to find that there had not been a contravention, because, as he said, it does not appear that the respondents were on the spot, or that the placing of the steam-engine in a forbidden situation was not a wilful or unauthorised act of their servants.

To this there are two answers. The first, is, that the Case as stated implies the contrary; and the second, that

no such ground of exculpation was maintained at the trial before the Sheriff.

For these reasons I am of opinion that the question presented in the Case should be answered in the affirmative, and as a consequence that the decision by which the respondents were assoilzied should be quashed. Further, we may not, indeed we have not been asked to proceed in judgment. If there is to be a conviction, and the infliction of a penalty, assuming that in the circumstances to be a result which can be competently reached, it must be the act or judicial determination of the Sheriff before whom the case was tried.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

The following was the Interlocutor :—

*‘Edinburgh, 14th March 1883.—Having considered this Case, and heard counsel for the parties, reverse the determination of the inferior judge: Remit to him to proceed according to law: Find the appellant entitled to expenses, which modify to seven guineas, for which and one guinea as the dues of extract, decern against the respondents.’*

Agent for the Appellant—J. L. HILL, W.S.

Agent for the Respondent—Messrs BEGG & MURRAY, Solicitors.

Present,

The LORD-JUSTICE CLERK.

ROBERT C. TRAILL, Suspendor—*M’Kechnie.*

AGAINST

JOHN KERMATH CHALMERS, Respondent—*C. Mackenzie.*

JURISDICTION—COMPETENCY—CIVIL AND CRIMINAL—REVIEW IN CIVIL CASES—DECLINING JURISDICTION—ACT 1672, c. 16 (Concerning the Regulation of Judicatories)—STATUTE 1, VIC., c. 41, SECS. 30 and 31 (Small Debt Act)—20 GEO. II., c. 43, SEC. 34 (Heritable Jurisdiction Act)—54 GEO. III., c. 67, SEC. 5 (For Allowing

1883.

No. 27.  
M’Leish  
v.  
Crichton.

High Court,  
March 14.

Appeal

Appeals to the Circuit Courts in Civil Cases)—STATUTE 16 and 17 VIC., c. 80, sec. 22 (Sheriff Court Act, 1853)—STATUTE 30 and 31 VIC., c. 96, SECS. 10-14, and 17 (Certain Debts Recovery Act, 1867).—A person decerned against in an action before the Sheriff Court upon an I.O.U. for the sum of £20, proposed to refer the cause and the resting owing to the pursuer's oath, which was refused, and on being charged to make payment, he suspended on the ground that by the Sheriffs having incompetently refused to allow the reference to oath, they had in effect declined their jurisdiction, and review by the High Court of Justiciary was therefore competent.—Held that the Sheriffs had not declined their jurisdiction, and that upon that ground the Bill fell to be dismissed, apart from any question as to the jurisdiction of the High Court of Justiciary to review the judgments of Sheriffs in purely civil cases, opinion upon which question was by a majority reserved.

Opinion (per Lord Young), that the judgments sought to be suspended having been pronounced in a purely civil case before the Sheriff Court, concluding for a sum above Twelve pounds, the High Court had no jurisdiction to review the same by way of suspension or otherwise.

1883.

No. 28.

Traill  
v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

THIS was a Bill at the instance of ROBERT C. TRAILL, Scotland Street, Edinburgh, to obtain suspension of certain interlocutors, together with a charge upon an extracted decree obtained in an action in the Sheriff Court at Edinburgh, at the instance of the respondent, JOHN KERMATH CHALMERS, writer, there, for the sum of £20 contained in an I.O.U., dated 12th April 1880, together with interest upon said sum from said date, which I.O.U. had, it was alleged, been granted by the suspender, Traill, to Mr John Neilson, W.S., Edinburgh, and of which Chalmers was alleged to be the onerous indorsee or assignee, and as such entitled to the amount thereof.

To the action it was answered by Traill in the Sheriff Court that Chalmers was not a *bona fide* holder of said I.O.U., that there was no valid assignation of the same for onerous considerations ever executed in his favour, and that he had no title to sue. That in point of fact he, Traill, was not owing the sum in said I.O.U. to John Neilson, W.S., and was entitled to absolvitor. That having become cautioner

along with the said John Neilson and another for W. B. Neilson, John Neilson's brother, in a cash credit bond, and the said W. B. Neilson having become insolvent, the cautioners had become liable for a balance of £400 upon said bond; and that at the time when the bond was signed John Neilson had promised to relieve him, Traill, of all balances or payments that might happen to fall due on the bond; and for that £400 he, Traill, held John Neilson's obligation of relief. That the said I.O.U. being thus not a good document of debt in the hands of John Neilson against him, Traill, John Neilson had induced the respondent Chalmers (who was a clerk in the office of the law-agent for the respondent, the pursuer in said action) to give his name as pursuer on the footing and pretence that he was the *bona fide* holder of the I.O.U. in order thereby to compel payment of the £20, notwithstanding that he, the said John Neilson, had failed to relieve him, Traill, of his share of the said balance of £400 due upon the cash credit bond, and in order thereby to avoid any defence founded upon the obligation of relief above mentioned.

In the action the Sheriff-substitute (Hamilton), on 18th October 1882, repelled the defences as irrelevant, and decerned in terms of the prayer of the petition; and to this judgment the Sheriff, on 18th November, adhered on appeal, adding—'The defences are quite irrelevant, and if the defender had been successful in the cause, the expenses of them would not have been allowed.' Traill thereupon lodged a minute of reference to Chalmers's oath; and on 1st December 1882 the Sheriff-substitute refused the reference to oath as incompetent.<sup>1</sup> Against this interlocutor there was also an appeal lodged, which the Sheriff, on 26th December 1882, held had not been timeously lodged, and dismissed the same.

<sup>1</sup> The following note was added to the interlocutor:—'The defences have been held irrelevant by an interlocutor which is now final. A reference to the pursuer's oath in the above terms ("the whole cause") is clearly incompetent.

1883.

No. 28.  
Traill  
v.  
Chalmers.High Court,  
Feb. 7 and  
Mar. 14.

Suspension.



1883.

No. 28.

Traill

v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

Thereupon Traill petitioned the Sheriff specially, on 10th January 1883, to be allowed to refer the cause as to the resting owing of the debt in the I.O.U. to Chalmers' oath. But Chalmers meanwhile moved the Sheriff-substitute, and obtained the approval of the auditor's report on his account of expenses, Traill objecting that there was no process before the Sheriff-substitute until the special petition before the Sheriff had been disposed of. The Sheriff-substitute, however, approved of the auditor's report, and decerned; and the decree having been extracted and recorded, Traill was charged thereon and immediately lodged the present Bill, by which it was sought to suspend—(1) The above interlocutor of 31 December 1882 refusing the said reference to oath; (2) the interlocutor of 26th December following dismissing the appeal against the same; (3) the interlocutor of 12th January thereafter approving of the auditor's report, and decerning for the amount of expenses; and (4) the above charge upon which the suspender was charged to make payment of the sum of £20 contained in the I.O.U. together with interest thereon at the rate of five per cent per annum from the date thereof until payment, together with various sums amounting in all to £31, 11s. 7d. being the amount of the expenses and dues of extract decerned for.

In the Bill it was pleaded the proceedings complained of being illegal and oppressive, the prayer of the Bill ought to be granted. The said Sheriff and Sheriff-substitute having most wrongously and unjustly refused to allow the complainer to refer his cause to the respondent's oath, the suspender is entitled to have the prayer of the Bill granted, with expenses. The interlocutor of 12th January 1883 having been pronounced when the Sheriff-substitute had no process before him, the same falls to be recalled. The said extract decree having been issued while the cause was still *sub judice*, the charge ought to be suspended with expenses.

C. MACKENZIE, for the respondent, objected to the competency of the Bill. The action on which the judgments complained of was pronounced, and upon which the extract sought to be suspended was obtained, is a civil action, brought by petition before the Sheriff at Edinburgh, for the sum of £20 contained in an I.O.U., together with interest upon said sum from the date of the I.O.U. until paid. The Sheriff-substitute has found the defences stated thereto irrelevant, and has decerned against the suspender, who thereupon referred the resting owing to the respondent's oath; and the reference to oath was declared to be incompetent and dismissed; and the days within which an appeal from that judgment of the Sheriff-substitute to the Sheriff-principal could competently be brought having expired, this Bill is brought for the purpose of endeavouring to set aside the same, together with a judgment of the Sheriff-principal dismissing the appeal against it which had not been timeously lodged. The cause is a purely civil cause which has run the gauntlet of the Sheriff Court, and being above £12, and not exceeding £25, cannot be brought under review in any form either in the Court of Session or in this Court. There was no refusal to exercise jurisdiction. A reference to oath is a matter for the discretion of the Court. *Pattinson v. Robertson*, Dec. 4, 1846, ix. D. 226. The case of *Sandys and Mandatory v. Lowden and Row*, High Court, Nov. 20, 1874, Couper, vol. iii. p. 43, proceeded on a concession as to competency, and the case also of *Dick v. The Great North of Scotland Railway Company*, Aberdeen, Oct. 8, 1860, Irv., vol. iii. p. 616, was before a Circuit Court; and a special civil jurisdiction is conferred by statute upon Circuit Courts, see 1 Vic. c. 41 (Small Debt Act), secs. 30 and 31;<sup>1</sup> 20 Geo. II., c. 43 (Heritable

1883.

No. 28.  
Traill  
v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

<sup>1</sup> Statute 1 Vic., c. 41 (Small Debt Act, 1837).

Section 30 provides, 'That there shall be no review in any cases "decided under the authority of this Act," i.e., in any small debt

1883.

No. 28.

Traill

v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

Jurisdiction Act), sec. 34 ; 16 and 17 Vic., c. 80 (Sheriff Court Act, 1853), secs. 22, 24, 25, 30, and 31 ; Vic. 36, secs. 10-14 and 17 (Certain Debts Recovery Act, 1867).  
Moncrieff on Review, pp. 162 and 224.

M'KECHNIE, for the suspender.—The Sheriff-substit

case “other than is provided by this Act.” And section 22 of the Sheriff Court Act, 1853, ‘It shall be competent to any one conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act (small debt) to bring the case by appeal before the next Circuit Court of Justiciary, where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh, in the manner and by and under the rules, regulations, conditions, and restrictions contained in the before-recited Act passed in twentieth year of the reign of His Majesty King George the Second, for taking away and abolishing Heritable Jurisdiction in Scotland, except in so far as altered by this Act, provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or such deviation in point of form from the statutory enactments as the Court shall think took place wilfully or have prevented substantial justice from having been done, or on incompetency, including deviation of jurisdiction of the Sheriff: Provided also, that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff with instructions, or for rehearing generally, and it shall not be competent to produce or found upon any document as evidence on the merits of the original cause which was not produced to the Sheriff when the case is heard, and to which no signature or initials have not been then affixed, which he is only to do if required, nor to found upon nor refer to the testimony of any witness not examined before the Sheriff, and whose name is not written by him when the case is heard upon the record copy of the summons, which he is to do when specially required to that effect: Provided further, that no sist or stay of the process and decree, and no certificate of appeal shall be issued by the Sheriff-clerk except upon the consignment of the whole sum, if any decerned for by the decree, and expenses, if any, and security found for the whole expenses which may be incurred and found due under the appeal.’

Statute 30th and 31st Vic., c. 96 (The Debts Recovery (Scotland) Act, 1867).

Section 2 allows causes between £12 and £50 to be tried summarily. Statute 16th and 17th Vic., c. 80 (Sheriff Court Act, 1853).

Section 22. ‘It shall not be competent, except as hereinafter

repelled the defences as irrelevant, and decerned in favour of the present respondent. He also wrongously refused to admit a reference to the respondent's oath, and the Sheriff-principal dismissed an appeal against the latter judgment as not being timeously lodged. The case being one concluding for a sum above £12, it is incompetent for us to appeal to the Circuit Court; and although this Court has no jurisdiction to review judgments pronounced in cases concluding for £25 and upwards, by reason of the prohibition in section 22 of the Sheriff Court Act of 1853 (16 and 17 Vic., c. 80), we are, we contend, entitled to redress in this Court by way of suspension at common law, in cases such as the present concluding for a sum between £12 and £25 where the Sheriff unjustly and illegally refuses to exercise his jurisdiction. *Davidson v. Russell and others*, Nov. 21, 1812, F.C. In refusing to allow a reference to oath, the Sheriff was here not simply disposing of a question regarding the mode of proof, but he was refusing to entertain an action competently before him, upon a ground which was in effect declining his jurisdiction. *Judex tenetur impertiri judicium suum*. *Sandys and Mandatory v. Lowden and Rowe*, High Court, Nov. 20, 1874, Couper, vol. iii. p. 43; *Dick v. The Great North of Scotland Railway Company*, Aberdeen, Oct. 8, 1860, Irv., vol. iii. p. 616; The Act of Geo. II. (20 Geo. II., c. 43, section 34) is repealed by the 22d section of the Sheriff Court Act of 1853 (16

1883.

No. 28.

Traill

v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

cially provided for' [see sect. xxiv.], 'to remove from the Sheriff-Court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other court or tribunal whatever, by advocacy, appeal, suspension or reduction, or in any other manner of way, any cause not exceeding the value of £25 sterling, or any interlocutor, judgment, or decree pronounced, or which shall be pronounced in such cause by the Sheriff.'

Section 26 extends the small debt jurisdiction of the Sheriff by providing that the words twelve pounds shall be substituted for £8, 6s. 8d. in the Small Debt Act, 1 Vic., c. 41 (1837).

1883.  
 No. 28.  
 Traill  
 v.  
 Chalmers.  
 High Court,  
 Feb. 7 and  
 Mar. 14.  
 Suspension.

and 17 Vic., c. 80), consequently there is no remedy this Bill is incompetent ; for there is no power of review in the Court of Session. And as there must be power in some Court to compel an inferior judge to do his duty, that power must be in the Court of Justiciary. The Bill is therefore competent. And upon the merits we contend that the defences set up to the action in the Sheriff Court were perfectly relevant. The refusal of the Sheriff-substitute to allow the cause to be referred to the pursuer's oath on the ground of these being irrelevant was therefore incompetent and illegal. *Dickson upon evidence*, p. 916.

LORD CRAIGHILL.—The grounds on which, according to the argument submitted at the bar for the complainant's suspension of the interlocutors and charge prayed for ought to be granted were—First, that the Sheriffs have refused to exercise their jurisdiction ; and, Secondly, that the High Court of Justiciary being vested with the power to compel inferior judges to do their duty, ought to grant the remedy for which the complainant asks. On the assumption that this Court has jurisdiction in such a case, I am of opinion that there is no ground whatever for its exercise on the present occasion, because the Sheriffs, as appears from the proceedings, did not refuse to exercise their jurisdiction, but applied their minds to the questions submitted to them, and gave their judgment, which according to their views of the facts and the law of the case, ought to be pronounced. They may, or they may not have erred in their decision ; but even if they did err, their decisions are final.

This view of the matter renders it unnecessary for me to give an opinion on the question of this Court's jurisdiction in civil matters ; and I am glad I am relieved of this necessity, because this question, which is of the very highest importance, was imperfectly argued at the hearing of the suspension. The case of *Dick v. The Great North of Scotland Railway Company*, and the case of *Sandys and Mandatory v. Lowden and Row*

were referred to as if they were decisive of the controversy; but it appears to me that these decisions only touched a fringe of the question which was raised for judgment. There are many more authorities in the books on the subject than those which were quoted,<sup>1</sup> and it will be unfortunate if, when the time comes when the question referred to must be determined, there is not a more exhaustive argument presented to the Court than that with which this Suspension has been supported.

I may add that had it been necessary for me to express an opinion on the question of jurisdiction in order that I might give judgment in this cause, my present persuasion is that I would have concurred in that which is about to be delivered by Lord Young, but for the reason explained at the outset my opinion on that point is reserved.

LORD YOUNG.—I am of the same opinion, but I am rather inclined to put my judgment upon the want of jurisdiction, for I am of opinion that we have no jurisdiction to consider this civil appeal. Unless a statute gives us such jurisdiction—the exceptional jurisdiction of review in civil cases—we have none. That has been done by statute in a variety of cases, but this is clearly not one of them. There is no appeal in such a case to the Circuit Court if it occurs beyond the Lothians, and therefore in a case within the Lothians there is no appeal to this Court. There is no ground in any statute for suggesting that we have here such a jurisdiction. It is said that the Sheriff refused to exercise his jurisdiction, and that this Court has an inherent power to compel all inferior judges to exercise their proper jurisdiction. I cannot assent to that unless with

1883.

No. 28.

Traill

v.

Chalmers.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

<sup>1</sup> Act 1672, c. 16, Scots Acts, vol. ii., p. 492—‘Act concerning the regulation of Judicatories’; 20 Geo. II., c. 43, sec. 40—Heritable Jurisdiction Act; 54 Geo. III., c. 67, sec. 5—Act ‘for allowing appeals to the Circuit Courts in Civil Cases’; Bankton, iv., 9, 4; Hume, ii., 10; Ersk., i., 3, 20, and 24; *Stewart v. M’Gregor & Son*, Aberdeen, Sep. 23, 1868; Couper, vol. i., p. 92.

1883.  
 No. 28.  
 Traill  
 v.  
 Chalmers.  
 High Court,  
 Feb. 7 and  
 Mar. 14.  
 Suspension.

this limitation—in criminal matters. We have no power to interfere to compel civil courts to exercise the civil jurisdiction. That belongs to the Supreme Civil Court. The argument indeed which was pressed upon us was, that as the Legislature has forbidden all resort to the Supreme Civil Court, therefore the appellants are by common law entitled to come for redress to the Supreme Criminal Court. I cannot sustain such an argument, and I am therefore prepared to put my judgment on that ground that there is no jurisdiction in this Court.

It is perhaps a little illogical to say that we have no jurisdiction, and yet to dispose of the Case on the merits—to say that we are of opinion that the Sheriff has done rightly, while we say that we have no power to consider his judgment. That objection may be hypercritical, however, and I substantially concur in the judgment proposed.

LORD JUSTICE-CLERK.—I have no difficulty in reaching the result of Lord Craighill's opinion, without any reference to the question of jurisdiction. It is said that this appeal is competent, because it is taken in a case where the Sheriff has refused to exercise his jurisdiction. But, in my opinion, there is no relevant averment here that the Sheriff did so refuse. All that the defender says the Sheriff did was to refuse to refer the matter to his oath; all that happened, in my view of the case, was that there was a flaw in the procedure, and the Sheriff dismissed the action on that ground.

I do not think it is necessary to give any opinion on the question as to whether we have power in this Court to interfere with a civil Judge who refuses to exercise his jurisdiction. The question is not new. It has often been the subject of argument, as well as of somewhat conflicting authority. I wish, however, to reserve entirely my opinion on it, as it does not arise here.

The following was the Interlocutor :—

‘*Edinburgh, 14th March 1883.*—Having considered this Bill, and heard counsel for the parties : Refuse the



Bill: Find the Respondent entitled to expenses, which modify to seven guineas, for which and one guinea as the dues of extract, decern against the complainer.'

1883.

No. 28.  
Traillv.  
Chalmers.

Agent for the Suspender—ABRAHAM NIVISON, S.S.C.

Agent for the Respondent—W. CONSIDINE, S.S.C.

High Court,  
Feb. 7 and  
Mar. 14.

Suspension.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG AND CRAIGHILL.

JAMES CRAIG, Appellant—*J. P. B. Robertson and W. C. Smith.*

AGAINST

DONALD M'PHEE, Respondent—*Mackintosh and Lang.*

WEIGHTS AND MEASURES—STATUTE 41 and 42 VIC., c. 49, SECS. 19, 22, 24, 29, and 73 (Weights and Measures Act, 1878)—PUBLIC HOUSE—STATUTE 38 AND 39 VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875)—APPEAL.—The 73d section of the Weights and Measures Act of 1878 enacts that 'an appeal against a conviction under this Act in Scotland shall be to the Court of Justiciary at the next Circuit Court, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, and not otherwise, and such appeal shall be made under the rules, limitations, and conditions' of the Act abolishing heritable jurisdictions.—Held that this enactment could not be read as excluding appeals on questions of law, under the 3d section of the Summary Prosecutions Appeals Act of 1875, for the opinion of the High Court.

A licensed spirit-dealer was in the habit of using glass vessels of three sizes, none of them imperial measures, or represented to be such, in supplying threepence worth, sixpence worth, or one shilling's worth of whisky, as the case might be, when a demand in that way was made by customers. No other quantity, such as twopence worth or fivepence worth, was supplied to customers in these vessels.—Held that this was not a sale by measure within the sense of the Weights and Measures Act, 1878, and a conviction under the 29th section of that Act *quashed*.

JAMES CRAIG, licensed spirit-dealer, Glasgow, was, on 2d February 1883, charged in the Southern Police Court, Glasgow, on a complaint under the 'Summary Jurisdiction (Scotland) Acts, 1864 and 1881,' at the instance of

No. 29.

Craig

v.

M'Phee.

High Court,  
Mar. 14.

Appeal.

1883.

No. 29.  
Craig  
v.  
M'Phee.

High Court,  
Mar. 14.

Appeal.

Donald M'Phee, procurator-fiscal, with having 'been guilty of an offence within the meaning of "The Weights and Measures Act, 1878," particularly section 24 (2) thereof, in so far as, on or about the

(1) Statute 41 and 42 Vic., c. 49 (Weights and Measures Act, 1878).

Section 19 :—' Every contract, bargain, sale, or dealing, made or had in the United Kingdom, for any work, goods, ware, or merchandise, or other thing which has been, is to be done, sold, delivered, carried, or agreed for by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by the Act, or to some multiple or part thereof, and if not so made or had shall be void ; and all tolls and duties charged or collected according to weight or measure, shall be charged or collected according to one of the imperial weights or measures ascertained by this Act, or to some multiple part thereof.

' Such contract, bargain, sale, dealing, and collection of tolls and duties as is in this section mentioned, is in this Act referred to under the term " trade."

' No local or customary measures, nor the use of the heaped measure, shall be lawful.

' Any person who sells by any denomination of weight or measure other than one of the imperial weights or measures, or some multiple part thereof, shall be liable to a fine not exceeding forty shillings for every such sale.'

Section 22 :—' Nothing in this Act shall prevent the sale, or subject a person to a fine under this Act, for the sale of an article in any vessel, where such vessel is not represented as containing any amount of imperial measure, nor subject a person to a fine under this Act for the possession of a vessel, where it is shewn that such vessel is not used, nor intended for use as a measure.'

(2) Section 24 :—' Every person who uses, or has in his possession for use for trade, a weight or measure which is not of the denomination of some Board of Trade standard, shall be liable to a fine not exceeding £5, or, in the case of a second offence, £10, and the weight or measure shall be liable to be forfeited.'

(3) Section 29 :—' Every measure and weight whatsoever used for trade shall be verified and stamped by an inspector with a stamp of verification under this Act.'

' Every person who uses, or has in his possession for use for trade, any measure or weight not stamped as required by this section, shall be liable to a fine not exceeding £5, or, in the case of a second offence, £10, and shall be liable to forfeit the said measure or weight, and any contract, bargain, sale, or dealing made by such measure or weight shall be void.'

28th day of December 1882, the said James Craig, within the spirit shop or other premises situated at or near No. 120 Crookston Street, aforesaid, used, or had in his possession for use for trade, six or thereby glass measures which were not of the denomination of some Board of Trade standard: Or otherwise, the said James Craig has been guilty of a contravention of section 29 of the last-mentioned Act [see note (3), p. 244], in so far as, time and place before libelled, he did use, or have in his

1883.  
 —  
 No. 29.  
 Craig  
 v.  
 M'Phee.  
 —  
 High Court,  
 Mar. 14.  
 —  
 Appeal.

(4) Section 73.—‘An appeal against a conviction under this Act in Scotland shall be to the Court of Justiciary at the next Circuit Court, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, and not otherwise, and such appeal may be made in the manner and under the rules, limitations, and conditions contained in the Act of the twentieth year of the reign of King George the Second, chapter 43, entitled, “An Act for taking away and abolishing heritable jurisdictions in Scotland,” or as near thereto as circumstances admit. . . .’

(5) Statute 38 and 39 Vic., c. 62 (The Summary Prosecutions Appeals Scotland Act, 1875).

Section 2 enacts, *inter alia*, that the term ‘cause’ means and includes every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence, or the recovery of a penalty competent to be taken before an inferior Judge.

(6) Section 3.—‘On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge’s determination as erroneous in point of law, appeal there-against, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction or complaint under such Act, by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case, setting forth the facts and the grounds of such determination, for the opinion thereon of a superior Court of law as hereinafter provided.’

(7) Statute 44 and 45 Vic., c. 33 (The Summary Jurisdiction Act, 1881).

Section 9, sub.-sec. 4:—‘In all cases where an appeal is competent, it shall be in the power of Court of appeal, on the application of either party, and on such terms as to the Court shall seem fit, to amend the Case, and all appeals from proceedings under the Summary Jurisdictions Acts shall be taken to the High Court of Justiciary at Edinburgh, or on Circuit.’

1883. possession for use for trade, said six or thereby glass  
 No. 29. measures which were not verified and stamped with a  
 Craig stamp of verification under said Act, said alternative  
 v. offences being in contravention of "The Weights and  
 M'Phee. Measures Act, 1878," sections 24 and 29 aforesaid, and  
 High Court, such alternative offence is the first offence,' whereby the  
 Mar. 14. accused became liable in the penalties set forth in the  
 Appeal. Act.

Craig pleaded not guilty, but was convicted of the alternative offence charged under section 29 of the statute, and was fined 2s. 6d., with the alternative of two days' imprisonment, the glass measures being declared to be forfeited.

He took a Case, under section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, for the opinion of the High Court of Justiciary.

The Case stated that 'at the trial it was proved by the inspector of weights and measures and his assistant that the six glass vessels or measures referred to in the complaint were found on a shelf in the appellant's shop, alongside other ordinary utensils used for the purposes of his trade, and were seized by the inspector. On being afterwards tested, they were found to be all more or less deficient in capacity, as compared with standard measures verified under the Act, and they were neither stamped nor verified. . . . It was proved by the appellant's witnesses, his two salesmen, that the glass vessels or measures referred to and produced were used in the shop in supplying threepence worth, sixpence worth, or one shilling's worth of the best whisky, as the case might be, when asked for in that way by customers, which was frequently done, but that no other quantity, such as twopence or fivepence worth, was supplied to customers in these glass vessels. It was not proved, however, that when threepence, sixpence, or one shilling's worth of whisky was supplied in this way to customers that the glass vessels into which the whisky was put and handed to the customer were represented by the appellant or

his salemen as containing any amount of imperial measure.'

The question for the opinion of the Crown was:—'Has the appellant been properly convicted under the statute?'

MACKINTOSH and LANG, for the respondent, objected to the competency of the appeal.—We contend that section 73 of the Weights and Measures Act, 1878, [see note (4), p. 245] excludes the application to prosecutions under that Act of section 3 of the Summary Prosecutions Appeals Act of 1875 [see note (6), p. 245]. The Act of 1878 is subsequent in date to that of 1875, and it must be held, therefore, to have been passed with all the provisions of the Act of 1875 in view; yet there is in the Act of 1878 an express exclusion of all review, except as provided in the 73d section [see note (4), p. 245] and under that section an appeal to the High Court on a Case stated is incompetent. The Summary Jurisdiction Act of 1881, it is quite true, gives a right of appeal either to the Circuit Court or to the High Court, but only in 'cases where an appeal is competent' [see note (7), p. 245]. Here, however, an appeal is not competent, for the question is not one of jurisdiction merely—it goes a great deal deeper. Section 73 of the Weights and Measures Act excludes all appeal except on the grounds set forth in the Act 20 Geo. II., cap. 43, abolishing heritable jurisdictions, *i.e.*, it excludes appeals on the merits; but the appeal attempted here is on the merits, and therefore is incompetent.

ROBERTSON and SMITH, for the appellant.—The appeal is competent. There is in the Act of 1878 no express exclusion of the right of appeal under section 3 of the Act of 1875, and no reason for implying such an exclusion. The prosecution, as the complaint bears, is brought under the Summary Jurisdiction (Scotland) Acts of 1864 and 1881; it is therefore a 'cause' [see note (5), p. 245] in the sense of the Act of 1875, section 3 of which applies to 'any cause' [see note (6), p. 245]. But, even if section 73 of the Act of 1878 were held to repeal the

1883.

No. 29.  
Craigv.  
M'Phee.High Court,  
Mar. 14.

Appeal.

1883. 3d section of the Act of 1875 as regards prosecutions  
 No. 29. under the Act of 1878, that 3d section is re-enacted by  
 Craig section 9, subsection 4 [see note (7), p. 245], of the Sum-  
 v. mary Jurisdiction Act, 1881, which distinctly provides  
 M'Phee. that 'all appeals' may either come here or go to the  
 High Court, Circuit Court. Besides, section 73 applied only to  
 Mar. 14. appeals against a conviction, and consequently, if the  
 Appeal. respondent is right in his construction, this anomalous  
 result will follow, that a convicted person, being bound  
 by the restrictions of section 73, had a very limited right  
 of appeal, whereas the prosecutor, if unsuccessful in  
 obtaining a conviction, might come here under section 3  
 of the Act of 1875. Such a contention is untenable.

LORD JUSTICE-CLERK.—I do not think that this appeal  
 is excluded by the terms of the Weights and Measures  
 Act of 1878.

The Summary Prosecutions Appeals Act of 1875  
 introduced a right of appeal on a Case stated for the  
 opinion of the Court on questions of law in all causes in  
 the sense of the Act, without reservation, and it is  
 admitted that, if this Weights and Measures Act had  
 been passed before the Act of 1875, this appeal would  
 unquestionably have been competent, notwithstanding  
 any clause to the contrary contained in the Weights and  
 Measures Act. But the Weights and Measures Act was  
 passed in 1878, and it contains a clause providing that  
 appeals against convictions shall be taken to the Circuit  
 Court, and not otherwise; and it is said that this  
 excludes all appeals except appeals to the Circuit Court.  
 But it is plain that this can apply only to appeals on  
 grounds which may competently be entertained on Circuit.  
 It cannot apply to appeals against the inferior Judge's  
 determination as being erroneous in point of law, which  
 are not competent on Circuit. I quite concede that if in  
 such a statute as that with which we are here dealing it  
 had been specially provided that, notwithstanding the  
 general Act of 1875, no appeal should lie except to the  
 Circuit Court—if this had been provided in very express

terms—then this Court would have been bound to give effect to that provision. But I think that the words of this clause do not in the least lead to that result. I think that the Act of 1875 has full operation in regard to this statute, and in regard to all statutes of a similar description, unless they contain an exclusion of the clause in the general Act very much more express in its terms than what we have here. The policy of the Act of 1875 is manifest. Its object is to enable the Court to correct deviations in law on the part of the inferior Judge, although there may be no ground of appeal in accordance with the previously existing forms, and I think we should be hindering the proper and legitimate effect of this provision were we to deny the right of appeal here, merely because appeals against convictions are directed to be taken to the Circuit Court in cases in which it is not desired to show that the determination of the inferior Judge is erroneous in point of law. That provision applies to appeals against convictions only; it says nothing about acquittals; but the Act of 1875 is more general in its scope, and entitles either party to appeal against the determination of the inferior judge, and so to obtain the opinion of this Court on a question of law.

On the whole matter, therefore, I think that our jurisdiction is not excluded, and that this appeal is competent.

LORD YOUNG.—I am of the same opinion, and on the same grounds.

The Act of 1875, under which this Case is presented to us for our opinion, provides that a Case may be so presented for our opinion where, ‘on an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge’s determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which the cause shall have been brought excluding appeals.’ Now, that is a peculiar provision—I mean

1883.

No. 29.

Craig

v.

M’Phee.

High Court,  
Mar. 14.

Appeal.



1883.

No. 29.

Craig  
v.  
M'Phee.High Court,  
Mar. 14.

Appeal.

we had no such thing in our practice before this Act. We were familiar before that with appeals upon the ground of irregularity of procedure, and also with appeals—which, however, were generally excluded, although in some cases they were allowed—upon the proper merits of the cause: but where the jurisdiction of the inferior Court was well founded, and the proceedings, including the conviction or the acquittal, were regular, and review upon the merits was excluded, there was no possibility of interposing to remedy erroneous views of the law, however suspicious we might be that such erroneous views lurked in the mind of the inferior Judge; and the provision of the Act of 1875, which permitted either party to obtain a Case stated with reference to a question of law, was intended for the very purpose of enabling the Court to remedy any such error lurking in the mind of the inferior Judge, or hidden in the proceedings. Now, the the Act of 1875 itself defines the word ‘cause,’ to mean ‘every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge.’ These words are not limited to prosecutions for offences created prior to 1875 by statute or otherwise. They apply to subsequent as well as to prior statutes. Any summary proceeding for the prosecution of an offence or the recovery of a penalty which may be brought before an inferior Judge is included although the particular statute under which it takes place may have been passed in the last session of Parliament. Therefore, *prima facie*, the provisions of section 3 to which I have referred will regulate prosecutions under subsequent as well as under prior statutes, and among these provisions is that declaring the section to be applicable, notwithstanding any provision contained in the Act under which the cause has been brought excluding appeals in any manner of way. That also is, *prima facie*, applicable to subsequent as well as to prior

statutes. The reason of the thing applies to subsequent statutes containing such general clauses excluding appeals as well as to prior statutes. The Legislature did not do anything inconsistent with the policy of the clause excluding appeals when they said that there should be an appeal in order to disclose any error in law which might be lurking in the Judge's mind. The policy of the Legislature is to allow either party who thinks he has detected an error in law in the Judge's mind to ask him to state a Case in such a manner as to show what his view was, and to state it for the opinion of this Court. Of course it was competent for the Legislature to say that this provision should not apply in any particular case, but the introduction of a general clause excluding appeals, such as clause 3 itself contemplated—and that is all we have got here—is not a clause of that description, and does not exclude the policy and the intention of the provisions of the Act of 1875. Therefore I am of opinion that this objection, which is very technical, although thoroughly intelligible, is not well founded.

LORD CRAIGHILL.—I am of the same opinion. I do not think it was in the contemplation of the Legislature that the provisions of the Weights and Measures Act should derogate from the general provisions of the Summary Prosecutions Appeals Act, and I do think that the provisions of the Act which was passed in 1878 left untouched those of that which was passed in 1875 as regards the right of appeal. I think no other interpretation can be put on the clauses when read together. The position of matters as it stands seems to me practically to be this—There are certain well recognised grounds of appeal which are competent to be taken in the Circuit Court, and to these the provisions of the Act of 1878, directing the appeal to be taken to the Circuit Court, and to this Court only when there is no Circuit Court, are applicable. But the appeal allowed by the Act of 1875 is an appeal on a question of law stated by the inferior Judge in a special Case, and it is an appeal

1883.

No. 29.  
Craig  
v.  
M'Phee.

High Court,  
Mar. 14.

Appeal.

1883.  
 No. 29.  
 Craig  
 v.  
 M'Phee.  
 High Court,  
 Mar. 14.  
 Appeal.

for the opinion of this Court, not of the Circuit Court and consequently it is a right of appeal which it appears to me is left untouched by the Act of 1878. Besides the clause in the Act of 1878 deals with appeals against convictions only; and to hold that the right of appeal against convictions is limited to the grounds which may competently be entertained by the Circuit Court would be to carry the words of the Act of 1878 too far. It would be a strange result if an appeal on a Case stated were competent to the prosecutor and incompetent to the accused. I concur, therefore, in the judgment which your Lordship proposes, and I think it would be a matter for regret had the Court been compelled to come to any other conclusion.

The Court therefore sustained the competency of the appeal, and proceeded to hear the case on the merits.

ROBERTSON and SMITH for the appellant.—The conviction here is for a contravention of the 29th section of the Weights and Measures Act,—for having vessels used as measures for trade not verified and stamped as then provided for. The question is important, as the use of these vessels is universal in the trade. They are used for sales by price and not as a measure of capacity. Section 29 (p. 244) applies to measures of capacity used for trade, that is to say, which are used for sales by measure. Such measures, of course, require to be stamped and verified. But there is nothing illegal in using or having in one's possession unstamped vessels which are used in trade for containing or even selling therefrom money's worth, so long as the vessels are not represented as being a measure of capacity. The public are in no way deceived, and require in no way to be protected in the case of such sales. The transaction is a voluntary one, and the customer's eye is his protection. The transactions referred to in section 19 [see footnote (1), p. 244], and the expression '*for use for trade*' in the subsequent sections have reference only to sales by measure. The expression for use for trade means use for trade as an imperi-

measure. There is nothing inconsistent with the statute in keeping vessels for the purpose of trade, no matter of what capacity, if they are not represented to be measures of capacity, and the sale in which they are used is not a sale by measure. The 22nd section of the Act specially excepts from its operation such sales. It provides [*reads*, see footnote (1), p. 244].

1883.  
—  
No. 29.  
Craig  
v.  
M'Phee.  
—  
High Court,  
Mar. 14.  
—  
Appeal.

MACKINTOSH and LANG for the respondent.—The Case, which is a test Case, in reality raises the question whether the provisions of the Weights and Measures Act, 1878, are to be effectual for their purpose. The object of that statute was not only to prevent fraud, but also to secure uniformity in the use of weights and measures throughout the country by enforcing the use of recognised ascertained quantities in the shape of imperial weights and measures, and by forbidding the use of all others, and especially of such old local and customary measures as the mutchkin and half mutchkin. The glass vessels here complained of were no doubt not kept or used as being aliquot parts of a legal standard measure, but it is said that they are in universal use, and they are of uniform and definite size, and are used in the trade to denote a definite and well known quantity, and for the purpose of measuring it—the quantity being ascertained by the amount paid for it. If the vessels had a name, such as 'mutchkin' or 'half mutchkin,' they would clearly have been illegal; but it is said that so long as they are not named they may be used without infringing the statute. The contention, if given effect to, would defeat the statute. The charge in substance and in reality is that this appellant has been using customary local measures. The vessels are known as containing a definite quantity, and in reality are named, and their use we submit stands in no different position with reference to the enactments in the statute than would the use of the old half mutchkin, nor does it make any difference that a particular price is put upon the quantity. All use of measures other than imperial measures is prohibited

1883. by sections 19, 24, and 29. The latter section, under  
 No. 29. which the conviction was obtained, after providing that  
 Craig every measure and weight whatsoever used for trade  
 v. shall be verified and stamped, provides that 'every  
 M'Phee. person who uses or has in his possession any measure or  
 High Court, weight not stamped as required by this section shall be  
 Mar. 14. liable to a fine,' &c. [See footnote p. 244].  
 Appeal.

LORD YOUNG.—Why may you not, in terms of section 22, keep a vessel for the purpose of selling its content for a certain sum of money?

MACKINTOSH and LANG for the respondent.—Because that would be using the vessel for trade as a measure of capacity contrary to the provisions of the statute. A publican can, in terms of the statute, legally keep and use three kinds of vessels: 1st, Those in which liquor is kept in bulk; 2d, imperial measures; and, 3d, vessel used for drinking. The vessels complained of are used as vehicles to measure and transmit the liquor from the first named kind of vessel to the purchaser where a sale of that particular quantity takes place. Where sixpence worth or one shilling's worth of whisky is asked the sale must, in terms of the provision in section 19, be held to have been of a *quantity* as an aliquot part of an imperial measure. It cannot be contended that the vessels complained of are not used as a measure, and that because they are not named the sale is not a sale by measure. They are a well known, definite, ascertained measure of quantity, admittedly unstamped and unverified, and they are used in trade to measure a definite quantity, and as such they are illegal. The case does not fall under the exception in section 22 [*reads*]. The first part of that section was simply to save the use of tumblers and wine glasses, and when applied to the publican trade, refers to those vessels which are given away to the customer along with the quantity of liquor sold—vessels in which the liquor is conveyed from the publican to the customer; and it is confined to the offences in section 19. It is not the proper construction of sec-

tion 19, taken with reference to section 22, to say that sales by any denomination of measure other than an imperial measure are prohibited only where there is misrepresentation—where the vessel is represented as containing an amount of imperial measure. Such a construction would unduly limit and restrict the operation of the statute. All that the first part of the section was intended to enact was that, assuming that all sales by measure must be by imperial measure, a penalty shall not be incurred under section 19 for the sale of an article in a vessel unless the sale is under a local or customary measure. The second part of section 22 has reference to the offences in sections 24 and 29, and means that a person shall not be subject to a fine for the possession or use of a vessel in trade unless it is possessed or used as a measure. It prohibits all use of unstamped vessels as measures, whether recognised by custom or not. If a publican, for his own purposes, wants to measure by means of a vessel what he is going to sell, he must use an imperial measure duly stamped.

LORD YOUNG.—I think this is really a very clear case; indeed I am unable to see any difficulty about it at all. The Weights and Measures Act is a very important statute, and I need not say that we should not willingly do anything to interfere with its wholesome application. It applies primarily to sales by weight or measure, which is a phrase well understood in law. I need not say that all things are not sold by weight or measure, though all things—at least all material things—are capable of being weighed or measured, and generally both. Nevertheless all sales are not by weight or measure, and the statute applies only to sales by weight or measure. Whisky—as in this case—wine, beer, almost any liquid you can name, are capable of being sold by measure, though they are not necessarily, nor by any means universally so sold, and what is sold otherwise must be sold out of a vessel of some kind which contains it, and which in a sense may be represented as its measure, for every vessel

1883.

---

No. 29.  
Craig  
v.  
M'Phee.

---

High Court,  
Mar. 14.

---

Appeal.

1883.

No. 29.

Craig  
v.  
M'Phee.High Court,  
Mar. 14.

Appeal.

capable of containing a liquid will measure it. Because a liquid is sold in a vessel which contains it, and in that sense measures it, it is not necessarily so by measure in a legal sense. I put the case repeated during debate of a man ordering a glass of sherry or glass of whisky in an hotel. He is in a sense buying by measure, but not by any known measure, customary or imperial, but simply with reference to the measure of the vessel in which it is supplied to him for use. Glasses are of a great variety of sizes, and the idea is altogether a novel one that it is setting the Weights and Measures Act at defiance and rendering it nugatory, if you permit the sale of a glass of whisky in a refreshment-room at a railway station, or in a hotel, without having the glass stamped and verified by an inspector as containing an imperial measure, or an aliquot part thereof.

These are not sales by measure; they are like sales of parcels of tea or packets of tobacco ticketed 6d. or 1s. These are sales of a quantity marked with a price and set before the buyers' eyes. The Legislature did not mean to interfere with such sales, or with dealers who are transacting with such customers. These customers are not buying by measure, but by the eye, and know exactly what they are doing. The Weights and Measures Act has nothing in the world to do with them, and therefore the idea that we shall be interfering with the operation of the Weights and Measures Act by our decision we may pronounce in this case is out of the question, even taking into consideration that, with the view of preserving uniformity in sales by weight or measure, the Legislature has prohibited the use of all other weights and measures except those of the imperial standard. A sale by any local and customary weight or measure, which is not an imperial weight or measure is not a good sale. If any one went into this shop, and was supplied with whisky measured by a measure of the old Scotch denomination, or by any of the other local and customary measures, a penalty would be incurred.



by the dealer ; but to ask for a glass of whisky or a glass of curaçoa, or for 3d. worth of whisky or 4d. worth, none of these would be sales of the description intended to be struck at by the Act at all, and therefore the 22d section, of which we have heard so much, was introduced. A dealer is not entitled to use vessels, or to keep vessels in his possession for use as measures which are not imperial standard measures and stamped accordingly ; and he is subjected to a penalty if he does. It was to protect the dealer against the operation of that prohibition that there was introduced into the statute section 22, which provides that the dealer may sell in any vessel he pleases, provided he does not represent the sale as one by measure—that is, by some denomination of the standard measure. Section 24 might have struck against that. Again, by section 22, the dealer may have any vessel he likes in his possession, provided he does not use it in sales by measure, whether standard or otherwise. But section 29 might have struck against that unless the vessel had been stamped and verified in terms of the Act, and although the dealer did not intend to use it in any way prohibited by the Act. In short, the Act is intended to prevent sales by measure other than the imperial standard measure, and these alone. Here I am of opinion that, according to the facts presented to us, there was no sale, nor use of any vessel for sale, by measure. The customer did not intend to buy according to any of the recognised imperial measures, or according to any aliquot part of them ; he did not intend to buy by any local or customary measure ; he intended to buy 3d. worth or 6d. worth of whisky, knowing the quantity which in this shop he would get for the price. There is nothing in that against the Weights and Measures Act, and I do not see anything that is much to be protected. A man goes into a shop and thinks he gets the best quality and the best measure for 3d. ; and the man who does that requires no protection from the Legislature. So far as the public interest is concerned,

1883.

No. 29.  
Craig  
v.  
M'Phee.

High Court,  
Mar. 14.

Appeal.

1883.

No. 29.

Craig

v.

M'Phoe.

High Court,  
Mar. 14.

Appeal.

the least quantity of whisky you can get people to be satisfied with for 3d. the better. In short, I am of opinion that upon the facts stated there is no contravention of the statute, and that the conviction therefore is bad.

LORD CRAIGHILL.—I have come to the same conclusion. At first sight the case presented some difficulty, as there appeared to be a reasonable apprehension that the Act would be rendered in a great part nugatory if we gave effect to the appellant's argument. But on consideration I have in the end come to be of opinion that no contravention of the statute has been committed.

The 19th section of the statute provides that every contract by weight or measure shall be estimated according to imperial weight or measure; but that obviously implies that there may be other contracts which are not by weight or measure; yet even in such contracts there must be some way by which the seller may estimate the quantity of that which he is to give in exchange for the price; and I think that such contracts are what the 22d section of the statute contemplates. The last clause of that section provides that the person shall not be subjected to fine for the possession of any vessel when it is shewn that the vessel was not used, or intended to be used, as a measure. I think that what is truly meant there is that where the vessel is not intended to be used as a measure, but merely for the purpose of ascertaining that which is to be given for so much money, its possession does not constitute a contravention of the statute. I think we are to read the provision as referring to contracts which are by weight or measure, and in this view the provision does not contradict anything else to be found in the statute.

LORD JUSTICE-CLERK.—I have come without any hesitation to be of the same opinion as your Lordships. I think the prohibitions and penalties of the statute, in so far as they relate to contracts, are directed only against contracts by weight or measure, and that so far

as they relate to vessels, they relate only to vessels intended to be used for contracts by weight or measure. The contract here is a contract by price, not a contract by measure, and the vessels which were used in fulfilling this contract were not used, and were not intended to be used, as measures. The prohibitions and penalties of the statute, therefore, do not apply, and the conviction cannot stand. Your Lordships sustain the appeal.

1883.  
 No. 29.  
 Craig  
 v.  
 M'Phee.  
 High Court,  
 Mar. 14.  
 Appeal.

The following was the Interlocutor :—

' *Edinburgh, 14th March 1883.*—Having considered this Case, and heard counsel for the parties, sustain the appeal; on the question of competency sustain the competency of the appeal, and on the merits reverse the determination of the inferior Judge, and find the appellant entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the respondent.'

Agents for the Appellant—Messrs AULD & MACDONALD, W.S.  
 Agents for the Respondent—Messrs CAMPBELL & SMITH, S.S.C.

## SOUTH CIRCUIT.

### DUMFRIES.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE—*Taylor Innes, A.D.*

AGAINST

GEORGE LITTLE—*Watt.*

JAMES O'BRIEN and JOHN EMMERSON—*A. J. Young.*

RAILWAY—CULPABLE HOMICIDE—NEGLECT OF DUTY—STATIONMASTER—ENGINE DRIVER.—Circumstances in which culpable homicide was held to be relevantly charged against two sets of officials of a railway company through whose separate and successive failures of duty a collision, resulting in the death of a passenger, was occasioned upon a section of the line worked upon the block system.

GEORGE LITTLE, stationmaster, now or lately residing at or near Sanquhar railway station, in the parish of

1883. Sanquhar, and county of Dumfries; JAMES O'BRIEN  
 No. 30. engine-driver, now or lately residing at or near Railway  
 George Little Buildings, Hurlford, in the parish of Riccarton, and  
 and Others. county of Ayr; and JOHN EMMERSON, engine-driver  
 Dumfries, now or lately residing in or near Charles Street, Carlisle  
 April 3. were indicted and accused of the crimes of culpable homi-  
 Culp. Hom. cide; as also culpable violation or neglect of duty by a  
 and Neglect person employed on a railway, in consequence of which  
 of Duty. any of the lieges are killed or injured in their persons:

IN SO FAR AS, you the said George Little having been, time herein after libelled, in the employment of the Glasgow and South Western Railway Company as stationmaster at Sanquhar railway station aforesaid, and on duty at the said station, and it being your duty as stationmaster aforesaid, *under the rules and regulations of the said company* in the event of any danger signal being exhibited at said station, and of any up train being brought to a standstill at or near said station in compliance with such danger signal, not to authorise or induce the guard or drivers of such train to proceed on their journey, without your having first ascertained from the pointsman or signalman at said station that the line was clear of obstruction throughout the section ahead of said station, being the Mennock Siding section; and you the said James O'Brien and John Emmerson being, time hereinafter libelled engine-drivers in the employment of the said Glasgow and South Western Railway Company, and it having been your duty *under the said rules and regulations*, when employed in driving a train along the line of railway between Sanquhar station aforesaid and Mennock siding, situated two miles or thereby to the south of said Sanquhar station, and also in said county of Dumfries, to pay due attention to all signals, and particularly when driving south on the up line to the up distant signal, situated 756 yards or thereby to the north of the signal cabin at or near said Mennock siding, in the event of your finding such signal set at danger, immediately to shut off steam and reduce the speed of your train so as to enable you to stop at the up distant signal post, or, in the event of the way immediately in front of you being clear, to proceed slowly and cautiously, having such control of your train as to be able to stop it before reaching any obstruction that might exist between the said distant signal and the home signal or signal cabin, and still more before reaching any obstruction between the said home signal and the advance or starting signal, all at or near Mennock siding, and thereby to avoid collision with such obstruction: Yet nevertheless, on the 7th day of December 1882, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, a goods train

having shortly after six o'clock P.M. passed Sanquhar station aforesaid on the up line going south, and having reached Mennock siding and being detained there between the home and advance signals of the up line at said siding, and so being within the section ahead of Sanquhar station and obstructing it, and an express passenger train from Glasgow to Carlisle, drawn on that occasion by two engines, one of which, being the leading engine, was driven by you the said James O'Brien, and the other by you the said John Emmerson, having followed the said goods train on the up line, and having reached Sanquhar station at or about thirty-one minutes past six o'clock, and Thomas Dobson the signalman or pointsman at said station, then and now or lately in the employment of said railway company, having before its arrival ascertained by repeated messages from the signalman at Mennock siding that the section ahead of Sanquhar southwards was still not clear of the said goods train, and a special danger signal having been thereupon exhibited by the said Thomas Dobson from the signal cabin near to Sanquhar station, in addition to the three other or usual signals at the said station on said up line, viz., the distant, home, and advance or starting signals, which were all set at danger, and the said express passenger train having been brought to a standstill at or near the said station in compliance with the said danger signals, or some of them, you the said George Little did, time above libelled, at or near said Sanquhar station, in culpable violation or neglect of your duty, and in the knowledge that the said express passenger train following the said goods train had been brought to a standstill at or near Sanquhar station in compliance with the said danger signals, or some of them, and without your having first ascertained from the said Thomas Dobson that the line was clear of obstruction throughout the section ahead of your said station, being the said Mennock section, instruct John Stitt, son of, and then and now or lately residing with, William Stitt, railway inspector, at or near Sanquhar Townfoot, in the parish of Sanquhar aforesaid, and then under your orders as clerk in the Sanquhar station booking office, to go forward and tell the guard or drivers of the said express passenger train to go on with it, as the signals were not working in consequence of a snowstorm, or to take to the said guard or drivers a message of the like import; and a message in these words, or of the like import, having been delivered by the said John Stitt to the said John Emmerson, and to John Barton, railway guard, then acting as guard of the said express passenger train, and now or lately residing in or near Orchard Street, Carlisle, or to one or other of them, and having been immediately thereafter communicated through them to the said James O'Brien, the driver of the leading engine of the said express passenger train, you the said George Little did thus, in violation of your duty as aforesaid, authorise or induce them, as guard and drivers of said train,

1883.

No. 30.

George Little  
and Others.Dumfries,  
April 2.Culp. Hom.  
and Neglect  
of Duty.

1883. to proceed on their journey on the said up line : FARTHER, y  
 No. 30. said James O'Brien and John Emmerson, time above libelled  
 George Little receiving the said message, and being induced thereby to p  
 and Others. having proceeded at a high rate of speed on the up line toward  
 Dumfries, Mennock siding, and having come near the said up distant  
 April 8. situated 756 yards or thereby to the north of the signal cabin  
 near said Mennock siding, and said up distant signal being the  
 Culp. Hom. set at danger to stop your said express passenger train, in respe  
 and Neglect of Duty. the said goods train was still obstructing the said Mennock  
 section, and the up home signal at or near said last mentione  
 being also set at danger, you the said James O'Brien and  
 Emmerson did, time above libelled, in driving said express pa  
 train on said up line of rails between Sanquhar station and M  
 siding aforesaid, culpably and in violation or neglect of you  
 aforesaid, fail to pay due attention to the said Mennock up  
 signal, and did fail to shut off steam and reduce the speed o  
 train so as to enable you to stop at the up distant signal post, &  
 pass the said up distant signal post without slackening speed  
 least with undue speed, and when approaching the Mennock u  
 signal did fail to stop or have such control over your train &  
 able to stop it before reaching the said up home signal, or even  
 reaching an obstruction standing between the said up home sig  
 the up advance or starting signal of the said Mennock siding, &  
 said goods train, then about to be shunted on to the down  
 order to be out of the way of your said express passenger trai  
 in consequence of the said culpable violation or neglect by  
 each or one or more of you the said George Little, James O'Br  
 John Emmerson, of your respective duties above libelled, &  
 express passenger train and the two engines attached thereto  
 you the said James O'Brien and John Emmerson were resp  
 driving, did, at a point 195 yards or thereby south of th  
 Mennock siding signal cabin on the said up line, but to the  
 the up advance or starting signal of said siding and within the  
 ahead of Sanquhar station, come into violent collision with  
 of the said goods train, whereby John Doherty, cattle dealer,  
 lately before residing at or near Kennyglug, in the parish o  
 donagh, County Donegal, Ireland, then in the guard's van of  
 goods train, was crushed and received mortal injuries, and  
 diately or soon thereafter died, and was thus culpably killed  
 and all or one or more of you the said George Little, James  
 and John Emmerson ; and the several persons named and c  
 in the List appended hereto, titled 'List of Persons Injure  
 travelling in the said express passenger train, or some of the  
 injured in their persons : And you the said George Little havi  
 apprehended, &c.



WATT, for the panel Little, the stationmaster at Sanquhar, objected to the relevancy of the charge in the indictment as against him.—The charge as laid is not one at common law, but under the rules and regulations of the railway company, which are not libelled; and there are no rules and regulations imposing on Little the duties he is charged with neglecting. If there were any such, they ought to have been inserted in the libel. Further, it appears on the face of the indictment that the two other panels, the engine-drivers O'Brien and Emmerson, caused the accident by running into the siding at Mennock at great speed and without regarding the signals there which were against them. If that was the cause of accident resulting in the death of Doherty and the other injuries libelled, the prosecutor cannot, in his indictment, go back to another incident which took place before the train entered at all upon that section of the line at which the signals said to have been neglected by the drivers existed. It may be said that Little, the stationmaster, had fallen into an error in judgment in permitting the train to go on from Sanquhar to Mennock; but if the engine-drivers of that train had thereafter done their duty no accident could have happened. It is said that the stationmaster authorised and induced them to proceed. But that merely means that he explained and communicated to them to the best of his ability the state of the signals at his station. In any case, the charge against the engine-drivers is inconsistent with that against the stationmaster: the one excludes the other.

TAYLOR INNES, A.D., in reply, argued that where a loss of life has been caused by the negligence of two separate officials, each in his own department of one system, and where it could not have resulted without the concurrence of failure of duty on the part of both, both are relevantly charged with culpable homicide. This is especially the case under the railway system, which is throughout one of double checks and safe-

1883.

No. 30.  
George Little  
and Others.Dumfries,  
April 8.Culp. Hom.  
and Neglect  
of Duty.



1883. guards, as is shown by the Cases of *Paton v. M'Nab*,  
 No. 30. High Court, 8th Nov. 1845, Broun, vol. ii., p. 525 ;  
 George Little *Lyall v. Ramsay*, High Court, 25th March 1853, Irv.,  
 and Others. vol. i., p. 189 ; *Alex. Currie and Another*, High Court,  
 Dumfries, April 3. 13th Jan. 1873, Couper, vol. ii., p. 380.

Culp. Hom.  
 and Neglect  
 of Duty.

The Court observed that the charge was one at common law, and that the expression in the indictment, '*under the rules and regulations of the said company*,' ought to be deleted, but that in other respects the indictment was relevant.

There being no objection to the relevancy stated on behalf of the panels O'Brien and Emmerson, the following was the Interlocutor :—

'Lord Young repels the objection stated by Mr Watt, and finds the libel relevant.'

The panels thereupon pleaded not guilty, and after evidence was adduced, the Crown withdrew the charge against the engine-drivers O'Brien and Emmerson, in respect that while they were partly misled by the panel Little, the stationmaster, regarding the state of the line, there was not evidence of such subsequent recklessness on their part as could warrant a conviction ; but a verdict was asked against the stationmaster as having violated the rules of the block system.

LORD YOUNG, while approving of the withdrawal of the charges against the engine-drivers, pointed out to the Jury with regard to the stationmaster that there was an admitted error on his part, and the question as regards him was whether what he had done involved criminal negligence or violation of duty.

The Jury returned a verdict, unanimously finding the panels severally not guilty.

The Court accordingly assoilzied each of the panels *simpliciter*, and dismissed them from the bar.

## HIGH COURT.

Present,

LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ROBERT STIRLING, Complainer—*Ure*.

AGAINST

DAVID MURRAY (Procurator-Fiscal of Kirkintilloch Police Court),  
Respondent—*Shaw*.**POLICE—GENERAL POLICE AND IMPROVEMENT (SCOTLAND) ACT, 1862**  
**25 and 26 Vic., c. 101, SEC. 251, 'OBSTRUCTION, ANNOYANCE, OR**  
**DANGER OF THE RESIDENTS OR PASSENGERS'—STREET—RELEVANCY.—****The 251st section of the General Police and Improvement (Scotland) Act, 1862, renders persons liable to fine or imprisonment**  
**'who, in any street, . . . to the obstruction, annoyance, or**  
**danger of the residents or passengers, . . . shall use any**  
**threatening, abusive, or insulting words, or behaviour with intent**  
**or calculated to provoke a breach of the peace, or whereby a breach**  
**of the peace may be occasioned.'****A complaint bore that the accused had contravened this enactment, in**  
**so far as he had used 'abusive or insulting words towards J. F., to**  
**wit, "You are a damn beast," whereby such words so used were**  
**calculated to provoke a breach of the peace.'****The accused, having been convicted, brought a suspension, pleading**  
**that the complaint was irrelevant, in respect that it did not set**  
**forth that the words were used to the obstruction, annoyance, or**  
**danger of the residents or passengers.****The Court *suspended* the conviction.****ON 26th February 1883 ROBERT STIRLING was charged,**  
**in the Police Court of Kirkintilloch, at the instance of**  
**David MURRAY, procurator-fiscal, with a contravention of**  
**the 251st section of the General Police and Improvement**  
**(Scotland) Act 1862,<sup>1</sup> in so far as on 9th February 1883,**

1883.

No. 81.  
Stirling  
v.  
Murray.High Court,  
June 13.

Suspension.

<sup>1</sup> Statute 25 and 26 Vic., c. 101 (The General Police and Improvement (Scotland) Act), 1862.

Section 251.—'Every person who, in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, on the evidence of one or more credible witnesses, be liable in a penalty not exceeding forty shillings for each offence, or, in the dis-

1883. in Eastside Street, Kirkintilloch, he 'did use ab  
 No. 31. insulting words towards John Allan Forsyth, a  
 Stirling maker, now or lately residing in Kerr Street, Ki  
 v. loch, to wit, "You are a damn beast"; whereb  
 Murray. words so used were calculated to provoke a breac  
 High Court, words so used were calculated to provoke a breac  
 June 13. peace.'  
 Suspension.

Stirling pleaded not guilty, but was convicted  
 contravention charged, and fined forty shillings, v  
 alternative of fourteen days' imprisonment.

He brought a suspension against the procurato  
 pleading that the libel was irrelevant, in respect  
 did not set forth that the alleged abusive or ir  
 words were 'to the obstruction, annoyance, or da  
 the residents or passengers.'

URE, for the suspender, contended—It is essen  
 set forth that the words were used 'to the obst  
 annoyance, or danger of the residents or pass  
 By themselves, the words do not necessarily imp.  
 Besides, the complaint is bad for want of specif  
 It states,—'Whereby such words so used were calc  
 &c., but it does not set forth how the words wer  
 The conviction ought, therefore, to be quashed.

SHAW for the respondent.—The words stated  
 been used are in their very nature calculated to  
 annoyance to those who heard them, and, conseq  
 it is unnecessary to libel that they are to the an  
 of anyone. *M'Donald v. White*, High Court, Ju  
 1882, Couper, vol. v., p. . 'So used' was me  
 plusage.

LORD JUSTICE-CLERK.—I suppose your Lordsh  
 of opinion that this is altogether too trivial a ma  
 be made the ground of a conviction. The statute

---

cretion of the magistrate before whom he is convicted, may, v  
 penalty being inflicted, be committed to prison, there to rem  
 period not exceeding fourteen days, . . . (that is to say) i  
 every person who shall use any threatening, abusive, or  
 words or behaviour, with intent or calculated to provoke a l  
 the peace, or whereby a breach of the peace may be occasioned

down that the offence must be 'to the obstruction, annoyance, or danger of the residents or passengers,' but there is nothing here to show that the words were used to the obstruction, annoyance, or danger of any one. I think the conviction cannot stand.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor:—

'*Edinburgh, June 13, 1883.*—Having considered this Bill, and heard counsel for the parties, pass the Bill, suspend the conviction and sentence complained of, *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent.'

Agents for the Suspender—Messrs WEBSTER, WILL, & RITCHIE, S.S.C.

Agents for the Respondent—PARTY.

---

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

WILLIAM ROBERTSON, Appellant—*Shaw*.

AGAINST

THE LOCAL AUTHORITY OF PERTSHIRE—*J. P. B. Robertson*.

CONTAGIOUS DISEASES, ANIMALS—STATUTE 41 and 42 VIC., CAP. 74, SECTIONS 31, 61, and 64 (Contagious Diseases (Animals) Act, 1878)  
—POSSESSION—FOOT AND MOUTH DISEASE. FAILURE TO GIVE NOTICE OF—BOWING CONTRACT—TENANT.—Held that the tenant of a farm who failed to give notice that the cows belonging to him on said farm were affected with foot and mouth disease was rightly and competently convicted before the Justices as being the person having the cows '*in his possession or under his charge*,' within the meaning of section 31 of the Contagious Diseases (Animals) Act, 1878, and as such bound to report the existence of said disease to the police, notwithstanding that it was proved that he did not reside at the farm, and had let the cows upon it to his nephew, who resided there, on a bowing contract for payment of an annual sum for the milk of each cow, he, the bower, being bound to replace any cows which died.

1883.

No. 31.  
Stirling  
v.  
Murray.

High Court,  
June 13.

Suspension.

1883.  
 No. 32  
 Robertson  
 v.  
 Loc. Auth. of  
 Perthshire.  
 High Court,  
 June 12.  
 Appeal.

THIS was an appeal under the Summary Prosecution Appeals Act, 1875, at the instance of WILLIAM ROBERTSON, farmer, Oliverburn, in the parish of Kilspindie and county of Perth, against a conviction and sentence by the Justices of Peace for said county, upon complaint at the instance of the Local Authority for the county, which set forth that he, the said William Robertson, farmer, residing at Two-Mile House, in the parish of Kinnoull, and county aforesaid, and John Robertson, dairyman, Perth, and residing at Oliverburn aforesaid, have both and each or one or other of them contravened and been guilty of an offence against 'The Contagious Diseases (Animals) Act, 1878,' and section 31<sup>1</sup> thereof, actors, or actor or art and part, in so far as the said William Robertson and John Robertson, both and each or one or other of them having had, during a period of fourteen days or thereby immediately preceding the 28th day of February 1883, and at any rate upon the said latter date, belonging to them, or one of them, or in their possession and under their charge, C

<sup>1</sup> Statute 41 and 42 Vic., c. 74 (Contagious Diseases (Animals) Act, 1878).

Section 31—'Every person having in his possession or under his charge an animal affected with disease, shall, so far as practicable, keep that animal separate from animals not so affected, and shall, with all practicable speed, give notice of the fact of the animal being affected to a constable of the police establishment of the police district or area, county, borough, town, or place, wherein the animal affected is,' &c.

Section 60.—'If any person, without lawful authority or excuse proof whereof shall lie on him, does any of the following things, he shall be guilty of an offence under this Act. . . . If, where required by the Act to keep an animal separate, as far as practicable, or to give notice of disease with all practicable speed, he fails to do so.'

Section 66, subsection 4—'Where the owner or person in charge of an animal is charged with an offence against this Act, relative to disease or to any illness of the animal, he shall be presumed to have known of the existence of the disease or illness, unless and until he shows to the satisfaction of the Court of summary jurisdiction before which he is charged that he had not knowledge thereof, and could not with reasonable diligence have obtained that knowledge.'

the farm of Oliverburn, in the parish of Kilspindie, and county of Perth, sixteen cows, all or several of which cows were, during the whole or part of said period of fourteen days immediately preceding the said 28th day of February 1883, and at all events, on the said last-mentioned date, affected with a contagious or infectious disease, to wit, foot-and-mouth disease, yet nevertheless the said William Robertson and John Robertson did, both and each of them, illegally and culpably fail, with all practicable speed, to give notice of the fact of said animals being so affected to a constable of the police establishment for the county of Perth, and the said disease was found existing among the said cows by Alexander Johnstone, veterinary surgeon, Perth, the complainers' inspector, upon the said 28th day of February 1883, whereby the said William Robertson and John Robertson have each become liable in a penalty not exceeding £5 for each animal so affected, together with the expenses of the prosecution, all in terms of the said 'Contagious Diseases (Animals) Act, 1878,' and failing payment of said respective penalties and expenses, to be recovered by arrestment, poinding, and sale of their respective goods and effects, or by imprisonment for a period not exceeding sixty days each, or for a period as directed by 'The Summary Jurisdiction (Scotland) Acts, 1864 and 1881.'

JOHN ROBERTSON, the other respondent in the complaint, was found not guilty before the Justices, and was dismissed, and the charge against William Robertson was found proved, and he was sentenced to pay a modified penalty of five shillings for each cow affected. He thereupon appealed, and obtained a Case stated, which set forth that both the accused appeared at the diet fixed for the trial: that evidence was led on both sides, and the facts of the case as proved were these:—

'The appellant is the tenant and occupant of the said farm of Oliverburn, and the cows upon the said farm belong to him, and are housed by him and are in his possession. The farm-house is occupied

1883.

No. 32.  
Robertson  
v.Loc. Auth. of  
Perthshire.High Court,  
June 13.

Appeal.

1883.  
 —  
 No. 32.  
 Robertson  
 Loc. Auth. of  
 Perthshire.  
 High Court,  
 June 13.  
 Appeal.

by the said John Robertson—a nephew of the appellant—the appellant residing upon another farm about two miles distant from Oliverburn. The said John Robertson pays an annual sum for the milk each cow, and is bound to replace any cows which die. The cows are milked by Isabella Brown, a servant of the said John Robertson's, who obeyed the orders of both of the accused.

‘On the 28th February Mr Johnstone, the respondent's veterinary surgeon, made a surprise visit to Oliverburn, in consequence of having learned that some cows which had been bought at Messrs Hay & Kyd's sale in Perth, on the 9th February last, had gone thither, and from which sale foot-and-mouth disease had been disseminated throughout the county. He found sixteen cows—four of which were suffering from foot-and-mouth disease, one very noticeably—its teats being sore, its mouth frothing, and being very lame; and twelve had recovered, but bore manifest traces of having suffered from the disease. Had the disease been brought from Messrs Hay & Kyd's sale on the 9th February, the disease could have run its course by the 28th February in those animals which took it at first.

‘Oilcake had been bought from Messrs Campbell & Co., merchants in Perth, and taken to the farm in a cart in which there was a calf affected with foot-and-mouth disease about a week after the 9th February, but the oilcake was not given to the cows until a week or ten days thereafter. Foot-and-mouth disease does not develop itself until two or three days after the animal has become affected with it.

‘When the inspector had completed his visit on the 28th, and was leaving Oliverburn, he met the appellant proceeding to a brother-in-law's at Durdie with some calves; in going to which place he would require to have passed Oliverburn. The inspector stopped him, and sent him round by a road by following which he had not to pass the infected place.

‘Both of the accused, who tendered themselves as witnesses in terms of the Act, denied any knowledge of the existence of the disease. The female servant who milked the cows admitted knowledge of the soreness of the cows' teats, but otherwise denied knowledge of the disease. Intimation was for the first time given by the accused of the existence of the disease to the police authorities through the constable who accompanied the inspector on his said visit on 28th February, 1883.

‘There were produced in evidence (1) the return by the veterinary surgeon, Mr Johnstone, in terms of the Act, certifying that on the 28th February there were sixteen diseased animals at Oliverburn, twelve of which had recovered, and four of which had not; (2) the declaration of disease, declaring that foot-and-mouth disease existed in the farm-buildings of Oliverburn; and (3) a declaration by Mr Crawford, a member of the Local Authority for Perthshire, declaring Oliverburn an infected place.



'The Court was not satisfied that the accused had no knowledge of the existence of said disease during the period specified in the complaint, or, at all events, that they could not with reasonable diligence have obtained that knowledge.

1883.

No. 32.  
Robertsonv.  
Loc. Auth. of  
Perthshire.

'Neither of the accused gave notice, with all practicable speed, of the fact of the animals being affected with said disease to a constable of the police establishment for the county of Perth.

High Court,  
June 13.

'The Court found the charge against the appellant proved, but modified the penalty to 5s. for each cow, making in all £4 of penalty, together with £2 of expenses.

Appeal.

'The grounds of the Court's determination are (1) that the appellant was in possession of said cattle, which belonged to him, and which were housed on his own said farm of Oliverburn, and that said cattle were, on the 28th February 1883, either suffering from said foot-and-mouth disease or had been suffering therefrom within the period specified in said complaint; (2) that the Court were not satisfied that the appellant had no knowledge of the existence of said disease, or, at all events, that he could not with reasonable diligence have obtained that knowledge; and (3) that he did not give notice, with all practicable speed, of the fact of the animals being affected with said disease to a constable of the police establishment for the county of Perth.'

The question of law for the opinion of the High Court of Justiciary was, Whether the 'appellant was, under the circumstances above set forth, rightly convicted under the Contagious Diseases (Animals) Act, 1878?

SHAW for the appellant.—The appellant has been here wrongously convicted. Although the tenant of, he did not reside at, Oliverburn, the farm upon which the cattle in question were, but at another farm, of which he was also tenant, about two miles distant; and although he was the proprietor of the cows upon Oliverburn, they were not at the date of the offence 'in his possession or under his charge' within the meaning of section 31 of the Contagious Diseases (Animals) Act. John Robertson, his nephew, the other respondent in the complaint, resided at Oliverburn, and the cows were bowed out to him. He paid to the appellant an annual sum for the milk of each cow, and he was bound to replace any cow which died. It was John Robertson, we contend therefore,

1883. who was liable for any disease that might attack  
 No. 32. animals, and responsible for the performance of  
 Robertson duties arising from disease. It is not said in the co  
 v. plaint that the appellant knew that the cows w  
 Loc. Auth. of affected with disease.  
 Perthshire.

High Court,  
 June 13.

Appeal.

J. P. B. ROBERTSON for the respondent.—That is p  
 vided for in section 66, sub-section 4, of the statu  
 Knowledge need not be averred or proved. [See fo  
 note p. 268.] The onus of proving ignorance lay up  
 the appellant as a respondent in the complaint.

SHAW for the appellant.—At all events, from the f  
 of there being an absence of presence on his part up  
 the farm of Oliverburn, and that from the nature of t  
 contract between himself and his nephew, the cows w  
 under the charge of his nephew, who was responsible  
 their condition, the appellant was not, we contend, t  
 person in possession of them or under whose charge th  
 were within the meaning of the Act. He was not the  
 fore a person who could, in terms of the section libell  
 be competently complained against. The convicti  
 ought therefore to be set aside.

Counsel for the respondent was not called upon  
 reply.

LORD YOUNG.—This is an appeal under the Summa  
 Prosecutions Appeals Act, 1875, which allows an appe  
 against the erroneous determination of an inferior Magi  
 trate in point of law, upon a Case stated setting for  
 the facts and the grounds of such determination. And  
 it had been shewn that the Justices here had acted on  
 erroneous view of the law, then the judgment might ha  
 been recalled: but I can find no evidence in the case  
 any error of that kind. I think that the facts set for  
 in the Case show that there was no error in point of la  
 committed. I think it cannot be doubted that a pers  
 who bows out his cows to a relation, or to a person w  
 is no relation, may very well continue to have these  
 his possession, or under his charge. And the Magistra  
 has found in fact here that that was the position of th

**appellant.** It is stated in the Case that it was proved **that** 'the appellant is the tenant and occupant of the **said** farm of Oliverburn, and the cows of the said farm **belong** to him, and are housed by him, and are in his **possession,**' and the Justices have accordingly convicted **him** for not having given notice that the cows in question **had** been attacked by disease. If the facts had been such, and it could have been shewn that he had no right to the cows, and had no connection with them, that might have altered the case, and there might have been room for a question of law. On the facts stated I can find no legal error whatever. I think accordingly that the appeal should be dismissed.

**LORD CRAIGHILL.**—It would have been a misfortune, I think, if it had been necessary to have quashed this conviction. It is proved as Lord Young has pointed out, that the appellant was in the possession of the cows, which were housed on the farm of which he was the tenant and occupant, and they were subject to his orders. The case therefore comes within the enactment in section 31 of the statute 41 and 42 Vic., c. 74. He was a 'person having in his possession animals affected with disease,' who failed with all practicable speed to give notice to a constable of the fact of the animals being so affected.

**THE LORD JUSTICE-CLERK.**—It seems to me that, according to the facts, the appellant never lost possession of the cows. The cows belonged to him and were housed by him on the farm of which he was the tenant and occupant. On the other hand, John Robertson, his nephew, who resides at the farm, was in charge of the cows upon a bowing contract by which he paid an annual sum for the milk of each cow, and was bound to replace the cows which died, and the servant who milked the cows obeyed the orders both of the appellant and of John Robertson. I concur therefore in thinking that the cows were in the appellant's possession in the sense of the statute.

1883.

No. 32.

Robertson

v.

Loc. Auth. of  
Perthshire.High Court,  
June 18.

Appeal.

1883.

The following was the Interlocutor:—

No. 32  
Robertson  
v.  
Loc. Auth. of  
Perthshire.  
High Court,  
June 13.  
Appeal.

'*Edinburgh, 13th June 1883.*—Having considered this Case, and heard counsel for the parties, Dismiss the appeal: Affirm the determination of the Justices, and decern.'

Agents for the Appellant—Messrs J. & J. GALLETTY, S.S.C.

Agents for the Respondent—Messrs GRAHAM, JOHNSTON & FLEMING, W.S.

Present,

The LORD JUSTICE CLERK.

LORDS YOUNG and CRAIGHILL.

WILLIAM HUTTON, Appellant—*Rhind.*

AGAINST

JACOB ORMOND GARLAND and ANOTHER, Respondents—*Moncreiff.*

APPEAL—STATUTE 38 and 39 VIC., c. 62, SEC. 3 (Summary Prosecutions Appeals Act, 1875)—COMPUTATION OF TIME FOR APPEAL—SUNDAY.—The Summary Prosecutions Appeals Act, 1875, enacts that a party desirous of having a Case stated for the opinion of the superior Court shall not be entitled to have such a Case stated unless, within three days after the determination of an inferior Judge, he shall lodge in the hands of the clerk of that inferior Court a bond of caution to answer and abide the judgment of the superior Court, and to pay the costs awarded by that Court or, in the discretion of the inferior Judge, consign in the hands of the clerk such sum as the inferior Judge may fix to meet the penalty and the costs of the superior Court.

Held that when one of the three days after the determination of an inferior Judge is a Sunday, it is not to be treated as a *dies non*, but is to be counted, unless it is the last of the three days; and consequently, that an appellant who had been convicted on a Saturday but did not offer to consign until the following Wednesday, was not entitled to have a Case stated.

No. 33.  
Hutton  
v.  
Garland.

High Court,  
June 13.  
Appeal.

ON Saturday, 19th May 1883, JOHN HUTTON was convicted of assault in the Leith Police Court, before Bailie Garland, and fined 40s., which he paid.

On Tuesday, the 22d, his agent wrote to the clerk of the Police Court, requesting that a Case might be stated under the Summary Prosecutions Appeals Act, 1875.

The clerk replied on the same day, stating that the Magistrate had fixed £8 as the sum to be consigned under the 3d section of the Act.<sup>1</sup>

On the day following—Wednesday, the 23d—Hutton's agent sent a cheque for £8, which the clerk returned the same day, on the ground that the money had not been deposited within the three days of the decision complained of. The clerk took no notice of a subsequent request by the agent to issue a certificate of refusal under the 4th and 5th sections of the Summary Prosecutions Appeals Act, 1875.<sup>2</sup>

In consequence, on the 25th May, Hutton presented a

1883.

No. 83.  
Huttonv.  
Garland.High Court,  
June 13.

Appeal.

<sup>1</sup> Statute 38 and 39 Vic., c. 62 (The Summary Prosecutions Appeals (Scotland) Act, 1875).

Section 3.—‘On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against, or review in any manner of way of, any determination, judgment, or conviction, or complaint under such Act, by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court of law, as hereinafter provided; and, on any such application being made, the following provisions shall have effect:—1. The appellant shall not be entitled to have a case stated and delivered to him unless within the said three days he shall (1) lodge in the hands of the clerk of Court a bond with sufficient cautioner for answering and abiding by the judgment of the superior Court in the appeal, and paying the costs should any be awarded by that Court, or otherwise, in the discretion of the inferior Judge, shall consign in the hands of the clerk of Court such sum as may be fixed by the inferior Judge to meet the penalty awarded, if any, and the said costs of the superior Court. . . .’

<sup>2</sup> Section 4.—‘It shall be lawful for an inferior Judge to refuse any application made to him under this Act to state and sign a Case, should he consider such application to be frivolous, provided that he shall forthwith give to the applicant a certificate of such refusal should the same be asked for,’ &c.; and by the 5th section this certificate of refusal is to be transmitted along with the application to the superior Court for an order on the inferior Judge and the other party to show cause why a Case should not be stated.

1883. Note in the High Court of Justiciary against Bailie (land and James Grant, the Procurator-fiscal, in which prayed for an order on them to show cause why a should not be stated, in terms of the Summary Prosecutions Appeals Act, 1875.

No. 88.  
Hutton  
v.  
Garland.  
High Court,  
June 18.  
Appeal.

Besides giving what he stated to be the details of evidence led at the trial, which evidence, he maintained did not in law warrant a conviction, Hutton pleaded the order prayed for ought to be granted, because the day was a *dies non*, and the three days prescribed by the statute extended into and included Wednesday 23d.

RHIND, for the appellant, argued—The money lodged in time, as Sunday was a *dies non*. It certainly would have been so had it been the last of the three days, *Craig v. Jex Blake*, March 16, 1871, ix. Ma 715, 43 Scot. Jur. 363; *Russell v. Russell*, Nov. 1874, ii. R., p. 82; Moncreiff, Review in Crim Cases, 202, and no principle could be suggested that another rule should be applied when it happened to one of the intermediate days. The English rule was different, *Peacock v. The Queen*, May 6, 1858, xxvii. 1 Com. Pleas, p. 224, but this Court had given a more liberal construction to other clauses of this statute than had been applied by the Courts in England, *Charleso Duffes*, High Court, June 10, 1881, Couper, vol p. 470.

Counsel for the respondent was not called on.

LORD YOUNG.—This case was originally presented to Lord Craighill and myself when we happened to be together, and I then understood that it was a case in which it was alleged that a convicted person had applied to the convicting Magistrate to state a Case for the opinion of this Court under the Summary Prosecutions Appeals Act of 1875, and that the Magistrate had refused to do so, and had also refused to grant a certificate of refusal, which the 4th section of the Act provides that he is to give, in the event of his refusing to state a Case

But it has been explained to us now that this is not an application of that kind, and that the Magistrate has refused to state a Case, not because he thought it had been asked for on frivolous grounds—which is the ground of refusal contemplated by the Act—but because the statutory conditions had not been complied with; and if that is so, the Magistrate was not only entitled to refuse to state a Case, but was even bound to do so. The statute provides that the appellant shall not be entitled to have a Case stated unless within three days from the date of the inferior Judge's determination he shall either lodge in the hands of the clerk of the inferior Court a bond with sufficient cautioner for answering and abiding the judgment of the superior Court, and paying the costs awarded by that Court, or, in the discretion of the inferior Judge, shall consign such sum as the inferior Judge may fix to meet the penalty he has awarded, and the costs of the superior Court. Now, this is to be done within three days, and the question here depends on this consideration, whether, when one of these three days is a Sunday, that day is to be counted as a *dies non*. The trial took place on a Saturday, and the appellant did not till the following Wednesday send the sum which the Magistrate had fixed to the clerk of the inferior Court, who declined to receive it on the ground that the statutory period of three days had by that time expired. But if Sunday is not to be counted as one of these days, and if consequently Wednesday is the third day from Saturday, then this party was in time, and he was entitled to have a Case stated unless the inferior Judge declined to state a Case on the ground that the application was a frivolous one. Now, no doubt three days is a short period, and to deduct one working-day may be a serious matter; for that practically reduces it to two; but I am afraid the law is quite settled. The Legislature has fixed upon this short period of three days, and it must be held to have done so with reference to the established rules of the common law as administered in this Court, according to

1883.

No. 33.

Hutton

v.

Garland.

High Court,  
June 18.

Appeal.



1883.  
 No. 33.  
 Hutton  
 v.  
 Garland.  
 High Court,  
 June 13.  
 Appeal.

which Sunday is to be counted, and it has also been so decided in England on the construction of the corresponding statute. Of course if Sunday happens to be the last of the three days, it is impossible to lodge the papers on that day, because the office is shut, and they may be lodged on the following Monday. But unless Sunday is the last of the days it must be counted. That result may in some cases be unfortunate, but I fear we must read the statute in the light of the rules of the common law, and I only wish to add that, having looked into the Note in this Case and seen the grounds on which the party desires to have a Case stated, I am relieved from any feeling that he is suffering any practical hardship through not being allowed to appeal.

LORD CRAIGHILL and the LORD JUSTICE-CLERK concurred.

The following was the Interlocutor :—

‘*Edinburgh, 13th June 1883.*—Having considered this Note, and heard counsel for the parties, Refuse the prayer of the Note: Find no expenses due, and concerned.’

Agent for the Appellant—ANDREW CLARK, S.S.C.  
 Agent for the Respondent—J. CAMPBELL IRONS, S.S.C.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THOMAS HENDRY, Appellant—*Shaw*.

AGAINST

THOMAS FERGUSON, Respondent—*Low*.

BREACH OF THE PEACE—RELIGIOUS MEETING—COMPLAINT—RELEVANCY—ALTERNATIVE COMPLAINT AND GENERAL CONVICTION.—Police Court complaint charging a man with having within a house occupied by the Salvation Army, and during a meeting of a branch of that Army, conducted himself in a riotous, outrageous, and disorderly manner, by then and there shouting and screaming at the

top of his voice, or otherwise creating a noise and disturbance, whereby the said meeting was interrupted and disturbed, and a breach of the peace committed,' held to be a relevant complaint, and a general conviction following thereon sustained.

ON 5th April 1883, THOMAS HENDRY, a waiter in Stirling, was charged in the Stirling Police Court, at the instance of THOMAS FERGUSON, the Procurator-fiscal, with the crime of breach of the peace, 'in so far as between the hours of eleven and twelve of the clock, on the forenoon of Sunday, the 1st day of April 1883 years, or about that time, the said Thomas Hendry did, within or near the Union Hall, situated in or near Thistle Street of Stirling, occupied or possessed by William Booth, General of the Salvation Army, and now or lately residing in or near Queen Victoria Street, in the city of London, during a meeting of the Stirling branch of the Salvation Army aforesaid, then being held in said hall, conduct himself in a riotous, outrageous, and disorderly manner, by then and there shouting and screaming at the top of his voice, or otherwise creating a noise and disturbance, whereby said meeting was interrupted and disturbed, and a breach of the peace committed.'

Hendry objected to the relevancy of the complaint, 'in respect it contained no allegation, either statutory or at common law, against the appellant, on which a conviction could follow.' The Magistrate repelled the objection.

Hendry then pleaded not guilty, but was found 'guilty as libelled,' and fined £3, with the alternative of twenty days' imprisonment.

He took a Case, from which it appeared—

'That on the day libelled, a meeting of the Salvation Army was held in the Union Hall, Stirling, of which the Salvation Army are the tenants. The meeting began at eleven o'clock forenoon. The appellant entered the hall at the beginning of the meeting. At the door of the hall on his entering he was cautioned by the doorkeeper to behave himself when in the meeting. The meeting consisted of religious services conducted by Miss Roberts, who bears the title of a captain in the Salvation Army. It began by a sacred hymn being sung, which

1883.

No. 34.  
Hendry  
v.  
Ferguson.

High Court,  
June 13.

Appeal.

1883.

No. 34.

Hendry

v.

Ferguson.

High Court,  
June 18.

Appeal.

was followed by prayer, reading some passages in the Bible, and an address given on the passages read. The service was principally conducted by Miss Roberts, but two other members of the Army took part in it. During the singing of the hymn, the verses of which ended with the words, "We'll walk with Thee," the appellant sung after the close of each verse, and in a loud voice so as to be generally heard in the hall, the words "We'll have some tea," in mockery of the words of the hymn. During the other parts of the service he made a noise with his feet, and at times imitated loudly the crying of a cat; and when two of the members, other than Miss Roberts, were addressing the meeting, he shouted out to one speaker that he was an idiot, and at or to the other speaker, "There goes another idiot." The proceedings of the meeting were interrupted and disturbed, and at times brought to a standstill by what the appellant did as above stated. Miss Roberts spoke to the appellant from the platform of the hall on which she was standing, and asked him to be quiet, and she subsequently, on his continuing his interruptions, came down from the platform and again spoke to him, and asked him to be quiet or leave the meeting. Other members of the Salvation Army also remonstrated, and asked him to be quiet or leave the meeting, but he told them to send for a policeman, and said it would take better men than those who spoke to him to put him out, and he refused to be quiet or to leave. Miss Roberts sent for a policeman, and shortly after the messenger had gone the appellant left the meeting. The appellant's disturbance of the meeting in the manner described lasted for nearly an hour, and it had the effect of disturbing and interrupting the meeting, and molesting the persons engaged in it. After he left the services proceeded quietly and without any disturbance.'

The questions of law were—'(1) Whether the complaint sets forth a relevant charge of breach of the peace? (2) Whether the facts proved warrant the conviction?'

SHAW, for the appellant, argued—There is no relevant charge here.

LORD YOUNG.—The charge is alternative, I see; and the conviction general, so that the appellant may say that he has been convicted of creating a noise and disturbance in some way or other not specified.

SHAW for the appellant.—That is one point against the conviction. From it the appellant does not in the least know for what he had been fined £3. But even apart from that the complaint is irrelevant. 'Shouting and screaming at the top of his voice' is not a relevant charge,

nor is it made relevant by the addition of 'whereby the meeting was interrupted and disturbed.' *Ritchie v. M'Phee*, High Court, Oct. 25, 1882, Couper, vol. v., p. 147; *Galbraith v. Muirhead*, High Court, Nov. 17, 1856, *Irv.*, vol. ii., p. 520; *Buist v. Linton*, High Court, Nov. 20, 1865, *Irv.*, vol. v., p. 210. And as regards the 'or otherwise creating a noise and disturbance' that is either mere redundancy, or if some further information was intended to be given, it is not given. In short, there is no specification of the particular character of the shouting and screaming; and such specification was necessary. For all that appeared from the complaint, the shouting may have been of the most innocent character. There is nothing specified about the purpose of the meeting. It may have been a political meeting, or of that character. It may have been a meeting at which discussion was invited, and at which some amount of noise and disturbance was inevitable. Nor is it set forth in the complaint that the accused persisted in his conduct, notwithstanding the remonstrances of those conducting the meeting. The complaint therefore is irrelevant. But even if the complaint were relevant as a Police Court complaint, the facts held to have been proved do not show that the appellant has been guilty of any breach of the peace. It was a public meeting, to which all were invited, and the appellant has merely expressed his dissent from the views that were being advocated. It was a meeting for discussion.

Low, for the respondent.—The complaint is relevant, taken as a Police Court charge. There is sufficient specification to let the accused know what was to be proved against him. The clause 'or otherwise creating a noise and disturbance,' is simply intended to let in evidence of the various acts of shouting and screaming cat-calls, and calling people idiots.

LORD YOUNG.—No. It is 'otherwise' than by shouting and screaming. Besides, you have a general conviction on an alternative complaint.

1883.

No. 34.  
Hendry  
v.

Ferguson.

High Court,  
June 18.

Appeal.

1883.

No. 34.  
Hendry  
v.  
Ferguson.

High Court,  
June 18.

Appeal.

Low, for the respondent.—Only the question of relevancy is raised in this Case—nothing is said against the conviction if the complaint is relevant. Then if the complaint is relevant, the facts held to be proved amply justify a conviction. It is a breach of the peace to disturb a political meeting, *Sleigh and Russell v. Moore* High Court, June 12, 1850, J. Shaw, 369, much more a religious one, *Dougall v. Dykes*, High Court, Nov. 1 1861, Irv., vol. iv., p. 101, which this was. It took place on a Sunday, and in a hall hired by the Salvation Army for their meetings, and the facts proved shew that these meetings are simply religious meetings. What the appellant did was something much more serious than merely to express his dissent—he persistently disturbed the meeting for an hour.

The LORD JUSTICE-CLERK.—It is at all events clear that the act which is charged here was a highly indecorous and improper one. The real root of the offence is that it is an interference with the liberty of the subject. In this particular case these persons were conducting within their own walls—whether wisely or unwisely calls for no opinion, and we cannot consider—what they regarded as solemn and sacred services—and for this man to go there for the purpose of preventing these services being conducted, and of turning them into ridicule, is, as I have said, a highly indecorous and improper proceeding, whether it is also a police offence or not. But I go further, for I think that it is a police offence. These persons are as well entitled within their own hall to have their meetings conducted in an order and decorous manner, as if it had been in one of the private houses, and therefore I am disposed to sustain this conviction. No doubt the complaint—as the Police Court complaints often are—is drawn with an alternative which gives rise to doubt and ambiguity where there need have been none, but on the whole, I am not disposed to give so much weight to that as to the opinion that the conviction should be quashed.

LORD YOUNG.—I am of the same opinion. Whatever may be thought about the proceedings of the Salvation Army within their own premises—and I have no opinion at all, for I never saw a meeting of the Salvation Army—their meeting was certainly quite lawful. They were within their own premises, making no disturbance; they were conducting their own proceedings, whatever people may think of them, lawfully and orderly, in a building which they have for the purpose, and for anyone to go there and express his disapprobation of them in the way this man seems to have done, was to subject him—and most justly—to the punishment which he received. I therefore agree with your Lordship that the conviction, as regards its general merits, should be sustained. I am more doubtful about the specification. However, that question really is not raised in the Case—I mean the want of specification in the second alternative of the charge, and the general nature of the conviction, proceeding on an alternative charge. It originated, I think, in a remark of my own, and I am disposed to withdraw that remark, and to decide the Case on the general merits.

LORD CRAIGHILL.—I think the complaint here is well libelled. I think there is a relevant charge of breach of the peace, and on the second of the two questions in the Case, I see no reason whatever for disturbing the decision of the Magistrate.

The following was the Interlocutor:—

‘*Edinburgh, 13th June 1883.*—Having considered this Case, and heard Counsel for the parties, dismiss the appeal: Affirm the determination of the inferior Judge: Find the respondent entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the appellant.’

Agent for the Appellant—JAMES M’CAUL, S.S.C.

Agent for the Respondent—PARTY.

1883.

No. 34.  
Hendry  
v.  
Ferguson.

High Court,  
June 13.

Appeal.

Present,

THE LORD-JUSTICE CLERK.

LORDS YOUNG and CRAIGHILL.

THOMAS HILL, Complainer—*Rhind*.

AGAINST

JOHN FINLAYSON AND OTHERS, Respondents—*J. Comrie Thomson*.

PROCURATOR-FISCAL—TITLE TO SUE—CONVICTION WHERE PROCURATOR-FISCAL'S TITLE DISPUTED.—A person convicted of breach of the peace in a Police Court brought a suspension on the ground that the appointment of the prosecutor as Procurator-fiscal had, some days before the date of the complaint, been found to be null in an action of declarator in the Court of Session, another person being at the same time found entitled to the office.—The Court refused the bill, holding that as the prosecutor had been appointed Procurator fiscal by the presiding Magistrate, and had, *de facto*, been performing the duties of Procurator-fiscal at the date of the conviction, the validity of his appointment could not competently be questioned in a suspension of a conviction obtained at his instance.

1883.

No. 35.

Hill

v.

Finlayson.

High Court,  
June 13.

Suspension.

ON 28th February 1883, in the Police Court of Fraserburgh, before John Park, senior Magistrate, on a complaint dated 28th February, and bearing to be at the instance of 'John Finlayson, solicitor in Fraserburgh, Procurator-fiscal of Court *ad interim*, duly appointed,' THOMAS HILL, residing in Aberdeen, was convicted of breach of the peace, and sentenced to ten days' imprisonment.

After he had served the period of imprisonment, Hill brought a Suspension, alleging that since his trial he had discovered that Finlayson had had no legal title to act as Procurator-fiscal, and, consequently, that the conviction and sentence were null. He called as respondents Finlayson, 'pretended Procurator-fiscal *ad interim* of the burgh of Fraserburgh ;' Andrew Tarras, 'Procurator-fiscal of that burgh ;' Mr Park, the presiding Magistrate, and John Proctor, the clerk of the Police Court.



In the Bill it was stated :—

‘The General Police and Improvement (Scotland) Act, 1862’ (25 and 26 Vict. cap. 101), was adopted in Fraserburgh in 1870.<sup>1</sup> In November 1882 the office of procurator-fiscal of the burgh became vacant, and on 29th November the three magistrates, Messrs Park, Mellis, and Tindall, met for the purpose of filling up the vacancy. Park presided, and the two other magistrates respectively proposed and seconded the appointment of Mr Andrew Tarras. Park himself proposed that Finlayson should be appointed, and in his capacity of chairman declined to declare the other motion carried, and adjourned the meeting. On 2d December Park, as presiding Magistrate in the Police Court, appointed (as the complainer contended, illegally) Finlayson interim fiscal, and thereafter Finlayson continued to act as interim fiscal at subsequent diets of the Court, Park being always the presiding magistrate to the exclusion of his two colleagues, who, to avoid a scandal, did not insist on their rights. Meanwhile, on 30th December 1882 and 17th January 1883, Tarras’ appointment was of new made and confirmed, but Park, sitting as the magistrate, having declined to recognise it, Tarras, on 24th January 1883, raised an action in the Court of Session against Park, Finlayson, and Proctor, the clerk of Court, concluding for declarator that he had been duly

1883.

No. 35.  
Hill

v.

Finlayson.

High Court,  
June 13.

Suspension.

<sup>1</sup> Statute 25 and 26 Vic. c. 101 (The General Police and Improvement (Scotland) Act, 1862).

Section 409.—‘It shall be lawful for the magistrates under this Act to appoint from time to time, by writing and during pleasure, the superintendent of police, or other fit person or persons, to be procurator-fiscal, for the purposes of this Act, of the burgh in which they are magistrates, and such procurator-fiscal shall within such burgh have all such and the like powers and privileges as by law appertain to any procurator-fiscal by the law of Scotland.’

Section 410.—‘In the temporary absence of the procurator-fiscal so to be appointed, occasioned by indisposition or other cause, it shall be lawful for the magistrate of police presiding in the Police Court to appoint a fit person to perform *ad interim* the duties of such procurator-fiscal, in the name of such procurator-fiscal or in the name of the person so appointed *ad interim*, and to insist in any proceedings which may have been commenced in the name of such procurator-fiscal.’

Section 411.—‘All actions, prosecutions, and proceedings for crimes and offences committed within the burgh, or for the recovery of fines, penalties, forfeitures, or expenses under the police provisions of this Act, the mode of recovering which is not herein otherwise provided for, shall be sued for before the magistrates of police in the Police Court at the instance of the procurator-fiscal to be appointed as herein authorised.’

1883. appointed procurator-fiscal, and that Finlayson had no right or title to the office of procurator-fiscal or interim procurator-fiscal. Decree in absence was pronounced on 24th February, but, notwithstanding Finlayson continued to act as fiscal, and, in particular, at the trial of the complainer on 28th February.

No. 85.  
Hill  
v.  
Finlayson.  
High Court,  
June 13.  
Suspension.

The suspender pleaded in the Bill—(1) The respondent Finlayson having no title to prosecute as Procurator-fiscal *ad interim* of Fraserburgh, the conviction of the complainer upon the complaint at that respondent instance against him, and sentence thereon, were and are incompetent, and fundamentally null.

REPLY for the suspender.—This is a prosecution neither at the instance of, nor with the consent of, a public prosecutor, and therefore the conviction is null. *Mitchell v. Scott and Mackay*, High Court, June 24, 1841. Arkley 315; Hume, vol. ii., p. 125. The original interim appointment was outwith the 410th section of the Act which only contemplated the case of the temporary absence of the Procurator-fiscal, not a vacancy in the office. Mr Finlayson could not possibly be regarded as a reputed fiscal, at any rate after the decree of declarator.

Counsel for the respondents was not called on.

LORD JUSTICE-CLERK.—I regret that this question should have been brought here, because the complainer really has not even a shadow of ground in point of law on which to stand. I do not inquire whether Mr Finlayson's appointment as Procurator-fiscal, whether on the day of the prosecution or on previous occasions, was one which would be upheld if properly canvassed before a competent Court, but it is perfectly clear that it is sufficient title to sustain the prosecution of this complainer. The ends of justice would be defeated if a person otherwise legally brought before the Magistrate were allowed to escape on the ground that the prosecutor had no title. A Court has ample power to appoint a prosecutor for the time if there be no one acting at the time, and the title so given is quite sufficient to sustain the proceedings of the particular Court, unless there

some radical objection, which does not seem to have been the case here. The truth is that the Magistrates appear to have been disputing as to the person to be appointed Procurator-fiscal, and those who consider themselves aggrieved in that matter may have their remedy, but it would be out of the question to allow their dispute to enure to the benefit of a person who has been convicted of breach of the peace,

Lords YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor :—

*‘Edinburgh, 15th June 1883.—Having considered this Bill, and heard counsel for the parties, Refuse the Bill : Find the respondents entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the complainer.’*

Agent for the Supender—WILLIAM OFFICER, S.S.C.

Agents for the Respondent—FRASER, STODART, & BALLINGALL, W.S.

## WEST CIRCUIT.

### GLASGOW.

Present, .

LORD YOUNG.

HER MAJESTY’S ADVOCATE—*A. Taylor Innes, A.-D.*

AGAINST

ROBERT SMILLIE—*M’Lennan.*

**WILFUL FIRE-RAISING—WICKED, CULPABLE, AND RECKLESS FIRE-RAISING.**—Direction by Lord Young, in charging a jury :—‘If a person intentionally, and not in pursuit of any lawful object, sets fire to premises, he commits the crime of wilful fire-raising ; and if, while engaged in some other unlawful act, or while in such a state of excitement as not to care what he is doing, he, without deliberate intention to do so, sets premises on fire, he commits the crime of wicked, culpable, and reckless fire-raising ; but the accidental setting on fire of premises by mere carelessness is not in ordinary circumstances criminal.

1883.

No. 35.

Hill

v.

Finlayson.

High Court,  
June 13.

Suspension.

Evidence on which, under the above direction, the jury found a charge of wilful fire-raising, or otherwise of wicked, culpable, and reckless fire-raising, against a panel, *not proven*.

*George MacBean*, Inverness, April 15, 1847, Ark., p. 262, followed.

1883.

No. 36.  
Robert  
Smillie.

Glasgow,  
June 20.

Fire-raising.

ON 20th June 1883 ROBERT SMILLIE was charged at the Glasgow Circuit, before Lord Young, with the crime of wilful fire-raising, or otherwise with the crime of wicked, culpable, and reckless fire-raising,

'IN SO FAR AS, having been at and prior to the 8th day of May 1883 in the employment of James Murray, ship-chandler, then and now or lately residing in or near Granville Street, Glasgow, as a porter, and having in that or in some similar capacity been occasionally, and in particular on or about the 7th day of May 1883, intrusted with a key of the oil-store or premises in or near Brown Street, Glasgow, then and now or lately occupied by the said James Murray, to enable you to obtain access to the said store or premises after business hours, and you having on or about the said 7th day of May 1883 entered said store or premises after business hours by means of said key, or in some other manner to the prosecutor unknown, you did, on the 7th or 8th day of May 1883, or on one or other of the days of that month or of the April immediately preceding, in or near the said oil-store or premises in or near Brown Street aforesaid, occupied by the said James Murray, wilfully, wickedly, and feloniously or wickedly, culpably, and recklessly, set fire to the said store or premises, by applying a lighted lucifer match or matches, or other ignited substance or substances to the prosecutor unknown, to a quantity of hay or other combustible material or materials to the prosecutor unknown, on the ground flat or other part of the said store or premises; and the fire thus, or in some other manner to the prosecutor unknown, wilfully, wickedly, and feloniously, or wickedly, culpably, and recklessly, set and applied by you, did take effect, and did burn and destroy part of the said store or premises,' &c.

The panel pleaded not guilty.

It appeared from the evidence that the panel, who was quite a lad, was on the day libelled intoxicated, and that about 8 o'clock P.M. he had returned in that condition to the oil-store to place therein a wheelbarrow which he had been using; that with the assistance of a friend he opened the store by means of the key intrusted to him, and having entered was with much difficulty induced by his friend to come out again; and that on

his friend leaving him he had immediately returned to the store, and locked the door from the inside. Between 10 and 11 P.M. a woman who lived on the other side of the street observed him through the windows to have lighted some gas jets on the first floor, and to be smoking a pipe. She did not think that he was doing anything criminal. The attention of two police-constables was drawn to his conduct, and they concluded from his movements that he was drunk, but on his turning down the gas they went away. Between midnight and one o'clock A.M. the police again saw the panel with some gas jets lighted and his coat off. They knocked loudly, demanding admittance, and thereupon the gas was once more turned down, and they went away. A few minutes later the premises were found to be on fire, and damage to the extent of £150 was sustained before it was extinguished. In the interval (as it afterwards transpired), the panel had left the building, and he was not found till next day. Evidence was further led (overruling an objection by the panel's counsel to its admissibility), that about five months prior to this occurrence the panel had explained to a companion in a previous employment that he could set premises on fire without risk of detection by placing a lighted candle on a pile of newspapers laid on a floor, by which contrivance several hours must elapse between the application of the fire and its taking effect. In answer to the Court the companion to whom this statement was made stated that he considered the panel to be weak-minded or 'queer.'

The ADVOCATE-DEPUTE in addressing the Jury contended that the evidence of the panel's peculiar views regarding the setting fire to buildings supplied a sufficiently intelligible motive to warrant a verdict of wilful fire-raising, there being none other suggested; that the probability was that he carried out in his drunken mood what he was proud to have contemplated when sober. But that even if the Jury were of opinion that he did not apply the light deliberately and intentionally, he was

1883.

No. 36.  
Robert  
Smillie.Glasgow,  
June 20.

Fire-raising.

1883. still, it was contended, guilty of the lesser offence  
 No. 36. culpable and reckless fire-raising, as it was proved t  
 Robert he was for hours where he had no right to be, and w  
 Smillie. doing this unlawful act was all the time acting v  
 Glasgow, gross recklessness. And if a fire was caused by g  
 June 20. and culpable recklessness, even without intention,  
 Fire-raising. lesser crime was committed. *Archibald Phaup*, H  
 Court, Nov. 9, 1846, Ark., p. 176; *George MacBe*  
 Inverness, 15 April, 1847, Ark., p. 262; *Willi*  
*Annandale*, High Court, Dec. 1, 1873, Couper, vol.  
 p. 498.

MACLENNAN, for the panel contended that the fire  
 merely an unfortunate accident. *George MacBe*  
 Inverness, 15 April 1847, Ark. p. 262.

LORD YOUNG, after consultation with LORD MURE  
 charging the Jury, said:—This Case is a peculiar  
 and requires some consideration. The prisoner, wh  
 a mere lad, and of rather weak intellect, was a port  
 fourteen shillings a week in this oil-store, and he is  
 charged with wilful fire-raising, or wicked, culpable,  
 reckless fire-raising, committed in the store. N  
 dealing with the charge of wilful fire-raising first, I h  
 to explain to you that this is a *nomen juris*, and me  
 the unlawfully and intentionally setting fire to dwelli  
 houses and other erections. In order to constitute  
 offence it is essential that the party should raise the  
 wilfully. If he does so, it does not matter what mot  
 he may have had. A common motive in practice is  
 realise the insurance on the premises, and that alw  
 makes the case a very bad one. Another motive  
 revenge. These are illustrations; but it may be genera  
 affirmed that if the act is done unlawfully and intenti  
 ally the motive does not matter. The motive alleg  
 here is that this weak silly lad, being drunk, someb  
 got it into his head that it would be a favourable opp  
 tunity for trying to carry out his peculiar views on  
 subject of fire-raising. This, however, is a mere surm  
 —the evidence adduced that he held these peculiar vie

gives it no higher value than any other surmise, and there is really no direct evidence whatever of its having been his actual motive in this case. If proved to have existed, it is a sufficient motive ; but if it is not proved, there is an end of the charge of wilful fire-raising, for no other motive has been suggested. The only evidence is that this drunk lad got into the store and lighted the gas, turning it off and on as occasion required. There is no direct evidence that he set the place on fire. That is conjecture, founded on the circumstance that he was on the spot at the time. But the conjecture is unnecessary, for if he was only lighting his pipe and threw away the match, failing to stamp it out with his foot (as drunk men, and even sober men, will do), the place might have gone on fire. Yet though his conduct in such a case would be careless—grossly careless—I cannot direct you to hold that he is necessarily guilty of a crime. He would certainly not be guilty of wilful fire-raising. Topsy men, for example, not infrequently let a bedroom candle fall, with the result that a house is burned. Their action is very careless, but not at all criminal ; otherwise persons with the most innocent intentions might be convicted because their proceedings resulted in some serious accident.

1883.

No. 36.  
Robert  
Smillie.Glasgow,  
June 20.

Fire-raising.

To come now to the other charge of wicked, culpable, and reckless fire-raising. That is a crime of this nature—If a man, while engaged in some illegal act, raises a fire, he is guilty of the crime of wicked, culpable, and reckless fire-raising, although he never intended or desired to raise the fire. Again, in the Case of *MacBean*, which was tried at Inverness in 1847, it was laid down that if a man was in such a state of reckless excitement as not to care what he was doing, it would certainly be a crime were premises to be set on fire by him—were he, for instance, to throw a lighted candle into a heap of inflammable materials. But the circumstances under which this crime can be committed are very special ; and after consultation with Lord Mure, I feel myself unable



1883.

No. 36.  
Robert  
Smillie.Glasgow,  
June 20.

Fire-raising.

to push the principle of criminal responsibility further than is indicated by these illustrations. Now, here the young man, in a state of disgraceful intoxication, went to the premises in question, and, having been taken away, immediately returned. A witness who watched him from her house on the opposite side of the street saw nothing criminal in what he was doing; and thought only of the possible danger to the man himself. He was also observed by the police to be in a drunken state, and their conduct in the circumstances is very strange. But neither did they see anything criminal; on the contrary they considered themselves justified in assuming that there was nothing wrong.

If, therefore, you can find evidence that the panel wilfully set fire to the premises in order to test his notions about fires—that he deliberately lighted a match and applied it to the buildings—then you will find him guilty of wilful fire-raising. If, on the other hand, you are of opinion that as a tipsy or even a sober man men sometimes do, he carelessly raised an accidental fire, then he is not necessarily a criminal. But if you think that he was in a state of excitement so great as not to care what happened, and raised this fire though without any deliberate intention to do so, he will be guilty of the crime of wicked, culpable, and reckless fire-raising, in accordance with the authority of *MacBean's Case*.

The JURY found both charges not proven, and the panel was in consequence assoilzied *simpliciter*, and dismissed from the bar.

Agent for the Panel—JAMES LINDSAY, Writer, Glasgow.

---

## HIGH COURT.

Present,

The LORD JUSTICE-CLERK.

HER MAJESTY'S ADVOCATE—*Brand, A.-D.*

AGAINST

WILLIAM SIMPSON—*Dean of Faculty (Macdonald) and Shaw.*

**FRAUDULENT DEBTOR—FRAUDULENT BANKRUPT—STATUTE 43 and 44 VIC. C. 34, SEC. 13, SUBSECTIONS (A) 1 and 2 (The Debtors (Scotland) Act, 1880)—WANT OF SPECIFICATION—RELEVANCY—KNOWLEDGE AND BELIEF—PROPERTY.**—It is enacted by section 13, subsection (A) 1, of the Debtors (Scotland) Act, 1880, that a debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, unless he proves that he had no intent to defraud, if he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs, in terms of the Bankruptcy (Scotland) Act, 1856, or the Cessio Act, as the case may be.—Held that there are three essential elements in the above enactment, which ought to be set forth in a charge of the said crime and offence, viz :—First, what the true state of the affairs of the accused was ; second, that he knew and believed it to be so ; and, third, that he did not disclose.

Terms of an indictment charging said crime and offence, which was held to be relevant, and which it was held contained a sufficient averment of knowledge and belief, and also of property and possession, on the part of the accused.

The Debtors (Scotland) Act, 1880, sec. 13, subsec. (A) 2, enacts that a debtor in a process of sequestration or cessio shall be guilty of a crime and offence, unless he proves that he had no intent to defraud, if he does not deliver up to the trustee in his sequestration 'all his property and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up.'

An indictment under this enactment charging the accused with not having delivered up the books, documents, &c., forming the vouchers of certain sums specified, held irrelevant, in respect it was not alleged that such books, documents, &c., had ever existed.

WILLIAM SIMPSON, farmer, now or lately residing at or near Broachrig, in the parish of Carrington, and county of Mid-Lothian, was indicted and accused :—

THAT ALBEIT, by an Act passed in the forty-third and forty-fourth years of the reign of Her Majesty Queen Victoria, chapter thirty-four,

1883.

No. 37.  
William  
Simpson.

High Court,  
July 16.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2

1883.

No 37.  
William  
Simpson.

High Court,  
July 16.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2

entitled 'The Debtors (Scotland) Act, 1880,' it is by section thirteen thereof enacted that 'The debtor in a process of sequestration or cess shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury, for any time not exceeding sixty days with or without hard labour (A), in each of the cases following unless he proves to the satisfaction of the Court that he had no intent to defraud, that is to say :—1. If he does not *to the best of his knowledge and belief* fully and truly disclose the state of his affairs, in terms of the Bankruptcy (Scotland) Act, 1856, or the Cessio Acts, as the case may be ; 2. If he does not deliver up to the trustee all his property and all books, documents, papers, and writings relating to his property or affairs, *which are in his custody or under his control*, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee : ' And by the said Bankruptcy (Scotland) Act, 1856, being an Act passed in the nineteenth and twentieth years of the reign of Her Majesty Queen Victoria, chapter seventy-nine, it is, by section eighty-one thereof enacted that 'The bankrupt shall make up, and at the meeting appointed for the election of a trustee, deliver to the clerk of such meeting a state of his affairs specifying his whole property wherever situated, the property in expectancy or to which he may have an eventual right, the names and designations of his creditors and debts and the debts due by and to him, and a rental of his heritable property, which state and rental shall be subscribed by the bankrupt and shall then be delivered to the trustee, and the same shall be engrossed in a sederunt book to be kept by the trustee, and the bankrupt shall, at all times, give every information and assistance necessary to enable the trustee to execute his duty ; and if the bankrupt fail to do so, or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him to give such information and assistance, and to grant such deed under the penalty of imprisonment and of forfeiture of the benefit of this Act, and unless cause be shown to the contrary the Sheriff shall issue a warrant of imprisonment accordingly : ' YET TRUE IT IS AND OF VERITY, that you the said William Simpson are guilty of the crime and offence set forth in the above recited thirteenth section of the said first-mentioned Act, subsection (A) 1, and of the crime and offence set forth in the above-recited thirteenth section of the said first-mentioned Act, subsection (A) 2, or of one or other of the said statutory crimes and offences : IN SO FAR AS, you the said William Simpson having been tenant, under a lease or tack for nineteen years granted by Lady Susan Harriet Grant Suttie, widow of the late Sir James Grant Suttie of Balgone and Prestongrange, Baron James Henry Robert Innes Ker, Duke of Roxburghe (former

Marquis of Bowmont and Cessford), and Major John Ramage Dawson, residing at Balado, Kinross-shire, acting tutors nominated to Sir George Grant Suttie of Balgone and Prestongrange, dated the 8th day of August and 15th day of October, both in 1879, of the farm of St Clement's Wells, in the parish of Tranent and county of Haddington, between the term of Martinmas 1878 and the term of Martinmas 1882, and you having failed to pay any portion of the rent for crop and year 1881, and having thus become indebted to the said tutors on behalf of their said ward, the proprietor of the said farm, and they having, on behalf of their said ward, on or about 31st January 1882, applied for and obtained from the Sheriff of the Lothians sequestration for the rent of crop and year 1881 under their right of hypothec; and they having thereafter presented a petition to the Court of Session for sequestration of your estates, and obtained a first deliverance thereon on 21st June 1882, and the Lord Ordinary officiating on the Bills, after various steps of procedure, having, on or about the 11th day of July 1882, resumed consideration of the said petition, sequestrated the estates then belonging, or which should thereafter belong to you the said William Simpson, before the date of your discharge, and declared the same to belong to your creditors for the purposes of the said Bankruptcy (Scotland) Act, 1856, and the Bankruptcy and Real Securities (Scotland) Act, 1857; and you the said William Simpson having thus become debtor in a process of sequestration within the meaning of the above-recited Act forty-three and forty-four Victoria, chapter thirty-four, section thirteen; and James Alexander Molleson, then and now or lately chartered Accountant in Edinburgh, having, at the first meeting of your creditors, being a meeting appointed *inter alia* for the election of a trustee, and held at Haddington on 24th July 1882, been duly elected trustee upon your said sequestrated estates, which election was confirmed by act and warrant of the Sheriff-substitute of Haddington, dated 7th August 1882, and it being your duty in terms of the before-recited eighty-first section of the said Bankruptcy (Scotland) Act, 1856, to make up and deliver to Thomas William Todrick, solicitor, Haddington, the clerk of the said meeting, a state of your affairs, specifying your whole property, wherever situated, your property in expectancy or to which you might have an eventual right, the names and designations of your creditors and debtors, and the debts due by and to you, and a rental of your heritable property, the said state and rental being subscribed by you, that the same might be delivered to the said trustee and be engrossed in the sederunt book to be kept by him; Yet notwithstanding contrary to the said 'Debtors (Scotland) Act, 1880,' and with intent to defraud the said petitioning creditors and the whole other creditors in the said sequestration, you did not, in the state of your affairs made up and produced by you at the said first general meeting of your creditors, and delivered to the said clerk, specify and set forth, as required

1883.

No. 37.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

1883. by the said eighty-first section of the said Bankruptcy (Scotland) Act  
 No. 87. 1856, your whole property wherever situated, the names and designa-  
 William tions of your creditors and debtors, and the debts due *by and to you*  
 Simpson. AND IN PARTICULAR, you did not include therein as property belonging  
 High Court, to you the following sums then *in your possession or under your control*  
 July 16. and which you well knew to be part of your estate falling by law  
 Cont. of under the said sequestration, and which ought to be divided among-  
 Debtors your creditors—(1.) the sum of £1300 or thereby which had been  
 (Scotland) uplifted by you from the branch of the Commercial Bank of Scotland  
 Act, 1880, in or near Dalkeith, on or about the 26th day of May 1881; (2.) the sum  
 sec. 13, sub- of £222, 17s. or thereby, received by you on or about the 2d day  
 secs. (A) 1 November 1881 from William Stenhouse, then and now or lately cor-  
 and 2. day, and potato merchant, in or near Springfield Street, Leith, in pa-  
 ment of straw supplied by you to the Inveresk Paper Mill Compan-  
 or to the said William Stenhouse; (3.) the sum of £400 or thereb-  
 which had been uplifted by you from the said branch of said bank on  
 or about the 19th day of November 1881; (4.) the sum of £80, 0s. 6d.  
 or thereby, which had been received by you, on or about the 21st  
 day of December 1881, from the said William Stenhouse, in payment  
 of straw supplied by you to the said Inveresk Paper Mill Company, c  
 to the said William Stenhouse, and (5.) the sum of £450 or thereb-  
 which had been uplifted by you from the branch of the Royal Bank  
 of Scotland at or near Musselburgh, on or about the 7th day -  
 February 1882; *Nor did you*, at any time, fully and truly disclos-  
 to the best of your knowledge and belief, to your said trustee or  
 your creditors, the state of your affairs with reference to the said  
 respective sums of money, or one or more of the said sums: LIKE-  
 (2.), you the said William Simpson, contrary to the said Debt-  
 (Scotland) Act, 1880, and with intent to defraud the said petition-  
 creditors, and the whole other creditors in the said sequestration, c  
 not deliver up to the said James Alexander Molleson, the said trust-  
 upon your said sequestrated estates, the said respective sums of £1300  
 £222, 17s., £400, £80, 0s. 6d., and £450, or one or more of these  
 as above libelled, your property at the date of your sequestration, an  
 then in your possession or under your control, and which, as you we  
 knew, ought by law to be divided amongst your creditors, and y-  
 did not deliver up to the said James Alexander Molleson, the book-  
 documents, papers, and writings, relating to and forming the vouchers  
 and evidents or documents of debt, for the said respective sums, &  
 one or more of the said sums, all which property, vouchers, and ev-  
 dents or documents of debt you were bound and required by law to  
 deliver up to him as trustee foresaid: And you the said William  
 Simpson having been apprehended, &c.

The DEAN OF FACULTY and SHAW, for the pane-  
 objected to the relevancy.—The indictment charges th-

contravention of the Debtors Act, 1880, sec. 13, subsecs. (A) 1 and 2—the first dealing with full and true disclosure, in terms of sec. 81 of the Bankruptcy Act, 1856, and the second with delivery of property and books, &c. In both cases there is thrown on the accused the *onus* of proving that he had no intent to defraud. Our first objection is, that in setting forth the first charge, the words ‘to the best of his knowledge and belief’ are omitted. The indictment does not charge that the panel failed to disclose to the best of his knowledge and belief. Yet these words are to be found in subsection (A) 1, and are we maintain of the essence of the charge, and are indispensable to its relevancy. There may be doubt or confusion as to where ownership rests with regard to certain things, and therefore unless it is said that the accused knows and believes that the property libelled is his, at the date of sequestration, there is no relevant averment of contravention of the said subsection. We further object to the same clause, that the words ‘fully and truly,’ though occurring in that subsection, are omitted from the charge. It should have been said that the panel did not, to the best of his knowledge and belief, fully and truly disclose, &c. There ought besides to have been some specification of the manner in which the panel failed to disclose, viz., whether the failure consisted in suppression or misrepresentation, and if the latter, what the particular misrepresentation was.

The LORD JUSTICE-CLERK.—Is it not a sufficient answer to this objection that the indictment proceeds to say :—‘And in particular, you did not include therein as property belonging to you the following sums then in your possession or under your control, and which you well knew to be part of your estate falling by law under the said sequestration, and which ought to be divided amongst your creditors’ and then to specify the sums.

The DEAN OF FACULTY and SHAW.—We contend it is not. In our view no part of the clause, including the portion just read, contains a specific averment of pro-

1883.

No. 87.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.



1883.

No. 37.  
William  
Simpson.

High Court,  
July 16.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

perty. Nor is the indictment in other respects sufficiently specific. It is not said that the sums of money uplifted from bank by the panel were his property at the date of his sequestration. The introduction of the words 'then in your possession or under your control' is inappropriate, and suggests that it is necessary to prove something more than mere property, while this is not the case. The offence dealt with by the Act is committed when there is a failure to include all the bankrupt's property, whether under his control or not. The averment at the end of the first charge, of failure fully and truly to disclose to the best of the panel's knowledge and belief, does not make the indictment relevant.

Secondly, the charge under subsection 2 is irrelevant. The words 'in his custody or under his control' are in the subsection, but are not in the charge. Nor is it set forth what books and documents, &c., were in the custody or under the control of the accused, and which he ought to have delivered up. The prosecutor was bound to have specified the books and documents required to be delivered up.

BRAND, A.-D.—The first objection proceeds upon misconception of the charge as stated in the indictment. Everything necessary to a relevant charge is duly set forth. The purpose is to charge the fraudulent exclusion by the accused of five different sums of money, forming part of his means and estate, from the state of his affairs made up and produced to his creditors, and the failure to disclose to his trustee and creditors the fact that these sums were his, and were available. That purpose is well accomplished in the charge as laid. It sets forth (1) that the panel did not, in the state of his affairs made up by him, include 'his whole property'—(2) that he did not 'include therein as property' certain specified sums which he well knew to be part of his estate falling under the sequestration. This is as specific an averment of property as the panel can demand. And



(3) that the panel did not at any time, either before, at, or after the date of his sequestration, fully and truly disclose, to the best of his knowledge and belief, to his trustee or creditors the state of his affairs with reference to the sums in question. Therefore the indictment completely negatives disclosure either in the state of affairs or in some other and less regular way, and brings the panel within the grip of the Act. The averment of failure fully and truly to disclose according to knowledge and belief was purposely placed at the close of the first charge, and as affecting the whole. The contention accordingly that the charge omitted a necessary statement as to knowledge and belief, has no basis in fact; and to urge that the words referred to should have been introduced into an earlier part of the indictment is merely criticism.

1883.

No. 37.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

In the next place, while it is admitted that the indictment does not state in what manner the panel failed to disclose, we maintain that relevancy does not require any such statement. The only use of such a statement would be as notice to the panel; but if there was such failure, he must well know whether it was by suppression or misrepresentation, and a detail such as is demanded is unnecessary.

In the third place, as to the use of the words 'then in your possession or under your control.' Their absence from section 13 (A 1) is not of itself any reason for excluding them from the charge. The main object of their introduction was to emphasize the averment of knowledge that the sums in question were part of the accused's estate. Not only is it said that he knew, &c., &c., but the sums of which he had knowledge were in his actual possession or under his control at the very time he abstained from including them in his state of affairs. Moreover, the insertion of these words in no way affects the relevancy of the remaining portion of the first charge. It may be unnecessary to prove something more than mere property, but in the present case it is

1883.

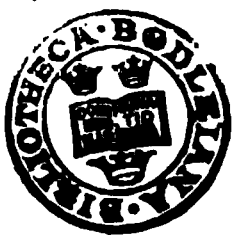
No. 37.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

proposed to prove possession or control, and accordingly notice of this is given in the indictment. It is unreasonable for a panel to complain that he gets more full notice than he can strictly demand. The corresponding words in the second charge must, to be properly understood, be read along with the averment of failure to deliver up. The failure to deliver up property not in the bankrupt's possession or under his control may obviously involve a different degree of guilt from the failure libelled.

The answer to the objection that the indictment does not say what books and documents, &c., ought to have been delivered up is that a bankrupt requires no detailed statement or description of his own books and documents, &c. But if it is thought that the indictment should have been more detailed and specific as to books, &c., I have no desire to press this part of the second charge.

The LORD JUSTICE-CLERK.—I have felt considerable difficulty in this case. The charges in this indictment are wanting in clearness and precision, although it is fair to say that the statute, which is recent, has not previously (on these clauses of it) been made the subject of prosecution, and might in some respects have been more lucidly expressed. This indictment proceeds on the 1st and 2d subsections of section 13 of the Debtors (Scotland) Act, 1880. The object of this part of the statute is to provide for the punishment criminally of bankrupt debtors who do not honestly disclose what property they possess, and who fail to make it available to their creditors. This section 13 provides generally that debtors who have been sequestrated shall be held to be guilty of a crime or offence, and shall be punishable accordingly, who shall do any of the acts specified in the subsections which follow, unless they prove to the satisfaction of the Court that they had no intent to defraud.

The first of these offences is thus expressed—‘(1) If he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms



of the Bankruptcy (Scotland) Act, 1856, or the Cessio Acts, as the case may be.'

The offence thus described is that first charged in this indictment. It contains three essential elements admitting of easy expression. First, what the true state of affairs was; secondly, that the accused knew and believed it to be so; and third, that he did not disclose it. Turning now to the charge as expressed in the indictment, I must own it is difficult to find these elements in the first part of the specification of this charge. As there expressed, the charge seems rather to relate to funds of which the accused had custody or control than to property, and I should have doubted from this part of the statement whether the prosecutor intended to allege that the sums of money afterwards specified belonged to the accused, or only that he had some sort of control over them. Neither in this part of the allegation is there a word said as to the prisoner's knowledge and belief—an element essential to the crime. Towards the end, however, of the first charge, there are some words beginning with 'nor did you at any time fully and truly disclose, to the best of your knowledge and belief,' which, if read as applicable to all which has gone before, as I think they must be, may be held to supply the imperfection. They amount to a statement that these sums belonged to the prisoner, that he knew them to belong to him, and that he did not disclose that they did so. I read the charge in that sense with some difficulty, but the prosecutor will be held very strictly bound to establish it in that signification of it.

In regard to the second charge, the subsection 2 on which it proceeds is the following—'(2) If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee.'

1883.

No. 37.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

1883.

No. 37.  
William  
Simpson.High Court,  
July 16.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. (A) 1  
and 2.

As to the first part of the offence stated in subsection 2, relative to the delivery of the bankrupt's property, if the first charge be proved, it is superfluous, for if the existence of this property was not disclosed of course it was not surrendered. The only case to which it could apply would be in regard to property which was disclosed but not in point of fact transferred. It is in such a case that the words 'custody and control' have any application. But although the charge in the present case may be superfluous, I cannot find it irrelevant. As regards, however, the books and papers, I am quite unable to sustain it. It is not alleged that there are or ever were any books and papers falling under this description, still less what they are. The prosecutor says he could not specify them, because he has no means of knowing what they are. But nothing is said to this effect in the indictment. If the withholding of these documents is to be treated as a specific crime, then they must either be described so as to be identified, or at least it must appear on the indictment that the prosecutor has done all he could to describe them.

This part of the indictment must be struck out, and hold the rest of it relevant.

The ADVOCATE-DEPUTE then withdrew from the libel the part of the second charge regarding the books, documents, papers, and writings referred to there, and the Court thereupon found the libel relevant.

The panel pleaded not guilty, but was found guilty of the first charge as libelled, as regards the sums of £1300 and £400, and sentenced to eight months' imprisonment.

Agents for the Panel—Messrs WOOD & LOUDEN, Solicitors, Haddington.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THOMAS LINTON, Appellant—*J. Comrie Thomson*

AGAINST

JAMES GEORGE BEAUMONT, Respondent—*M'Kechnie*.

**PUBLIC ENTERTAINMENT**—STATUTE 42 and 43 Vic., c. cxxxii. SEC. 287 (Edinburgh Municipal and Police Act, 1879)—**LICENSE**.—The 287th section of the Edinburgh Municipal and Police Act, 1879, enacts that 'the magistrates may license any house, building, or other premises to be used for any public show, exhibition, circus, or other representation or public entertainment,' under such regulations and conditions as they think fit, and that every person opening any public show, &c., without a license, shall be liable in a penalty.

Certain premises were open nightly (excepting Sunday) from seven till twelve o'clock to anyone on payment of sixpence, in return for which a ticket was given, entitling the holder to one refreshment, such as a cup of coffee or a glass of lemonade. Additional refreshments might be obtained on further payment. The refreshments were served in a large room capable of accommodating upwards of 200 persons, and provided with small tables and chairs. Music was played at intervals during the evening, the performers being stationed on a raised platform at one end of the room.

Held that these premises were not used for a public entertainment in the sense of the Act, and did not require a license.

JAMES GEORGE BEAUMONT was, on 19th May 1883, charged in the Edinburgh Police Court, at the instance of Thomas Linton, the Procurator-fiscal, with a contravention of the 287th section of the Edinburgh Police Act,<sup>1</sup>

1883.

No. 38.

Linton

v.

Beaumont.

High Court,  
July 18.

Appeal.

<sup>1</sup> Statute 42 and 43 Vic., c. cxxxii. (The Edinburgh Municipal and Police Act, 1879).

Section 287 enacts that 'the magistrates may license any house, building, or other premises to be used for any public show, exhibition, circus, or other representation or public entertainment, or any booth for dancing on any occasion, and for shooting galleries, and may make regulations for securing order and decorum at and in such places, and affix such conditions as they shall think fit to every license or permis-

1883. · aggravated by his having been twice previously convicted  
 No. 38. of a similar offence, 'in so far as, upon the 15th day of  
 Linton May 1883 years, the said accused did, without the license  
 v. of the magistrate, open, or was concerned in opening, a  
 Beaumont. public show, exhibition, entertainment, or representa-  
 High Court, tion, in the premises in or near Leith Street, Edinburgh,  
 July 18. occupied by him.'

Appeal.

Beaumont pleaded not guilty, and was acquitted by the Sheriff-substitute (Hamilton). The Procurator-fiscal took a Case.

The facts as stated in the Case were:—' That the respondent is the tenant of premises in Leith Street, Edinburgh, known as "The Grand Café," or "The Grotto," which are not licensed by the Magistrates under the above-named section of the Police Act. That the premises are open nightly (except on Sundays) from seven till twelve o'clock. That admission is obtained by the payment of sixpence at the door, in return for which a ticket is given, entitling the holder of it to one refreshment, such as a cup of coffee or chocolate, a glass of lemonade, cakes, buns, &c. That if no refreshment is taken, the sixpence is not returned, and if further refreshment is desired, fourpence additional is charged for every refreshment after the first. That the refreshments are served by waiters in a large room provided with small tables and chairs, and capable of accommodating upwards of 200 persons. That pieces of music are played at intervals during the evening, the performers being stationed on a raised platform or stage at one end of said room, and that, on the occasion libelled, there were three performers, viz., two men playing violins, and a woman playing a pianoforte.

---

sion so granted; and every person who shall open, or be concerned in opening, any public show, exhibition, circus, entertainment, representation or shooting gallery, or any apartments in common tenements, or any booth for dancing, without the license of the magistrates, or who shall contravene any such license, or permission, or regulation, shall be liable in a penalty not exceeding five pounds.'

That between two and three dozen persons entered the premises between 9.30 and 11 o'clock P.M. on the date libelled, and about 100 persons entered after 11 o'clock.

'The previous convictions libelled were proved in ordinary form.'

The question of law was,—'Whether the facts proved amount to a contravention of the 287th section of "The Edinburgh Municipal and Police Act, 1879"?'

LORD JUSTICE-CLERK.—I am of opinion, and very clearly, that there is nothing stated in the Case which makes the place kept by Beaumont a house used for a public entertainment in the sense of the Edinburgh Police Act. It is not a place where there is a performance in the proper sense of the word, and nothing seems to have gone on in it which is not *bona fide*. I think the appeal should be dismissed.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor:—

'*Edinburgh, 18th July 1883.*—Having considered this Case, and heard counsel for the parties, Answer the question in the Case in the negative: Dismiss the Appeal: Find the respondent entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the appellant.'

Agents for the Appellant—MILLAR, ROBSON, & INNES, S.S.C.

Agent for the Respondent—ROBERT EMSLIE, S.S.C.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

HUGH and WILLIAM O'NEILL, Appellants—*R. V. Campbell.*

AGAINST

COLONEL DUNCAN CAMPBELL, Respondent—*Pearson.*

SALMON FISHING—STATUTE 7 and 8 VIC., c. 95, SECTION 1 (Preservation of Salmon Fisheries Act, 1844)—ALTERNATIVE CHARGE—GENERAL CONVICTION—HERITABLE RIGHT—PROOF.—Held that a

1883.

No. 38.

Linton

v.

Beaumont.

High Court,  
July 18.

Appeal.



summary complaint charging a contravention of the Act 7th and 8th Vic., c. 95 (Act for the Preservation of Salmon Fisheries), section 1, in so far as the accused did 'wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take salmon, grilse, &c.' was not alternative, and a general conviction following thereon sustained.

Observed that it was extravagant to maintain that a proprietor of fishings prosecuting a poacher on the above complaint, ought to be called upon to produce his title to the fishings.

1883.

No. 39.  
O'Neill's

v.  
Campbell.

High Court,  
July 18.

Appeal.

THIS was an appeal under the Summary Prosecutions Appeals Act, at the instance of HUGH O'NEILL, and his son WILLIAM O'NEILL, fishermen, residing in Rothesay, against a conviction and sentence pronounced by one of the Sheriff-substitutes for Argyllshire at Inveraray (Campion), upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, setting forth :—

'That the said Hugh O'Neill,' . . . 'and William O'Neill,' . . . 'have both and each or one or other of them, been guilty of an offence within the meaning of the Act of Parliament 7th and 8th Victoria, caput 95, intituled "An Act to amend an Act of the ninth year of King George the Fourth, for the Preservation of the Salmon Fisheries in Scotland,"<sup>1</sup> actors or actor, or art and part, in so far as

<sup>1</sup> Statute 7 and 8 Vic., c. 95 (An Act to amend the Act 9 Geo. IV., c. 39, for the Preservation of the Salmon Fisheries in Scotland).

Section 1.—'If any person not having a legal right or permission from the proprietor of the salmon fishery shall, from and after the passing of this Act, wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, firth, sea, loch, creek, bay, or shore of the sea, or in or upon any part of the sea, within one mile of low-water mark, in Scotland, any salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than ten shillings and not exceeding five pounds for each and every such offence, and shall, if the Sheriff or Justices shall think proper, over and above forfeit each and every fish so taken, and each and every boat, boat tackle, net, or other engine used in taking, fishing for, or attempting to take fish as aforesaid; and it shall be lawful for any person employed in the execution of this Act, to seize and detain all fish so taken, and all boats, tackle, nets, and other engines so used, and to give information thereof to the Sheriff or any Justice of the Peace, and such Sheriff or Justice may give such orders concerning the immediate disposal of the same as may be necessary.

on Wednesday the 16th day of May 1883, or about that time, the said Hugh O'Neill and William O'Neill did both and each or one or other of them wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take salmon, grilse, sea trout, or other fish of the salmon kind, in or from the sea, creek, bay, or shore of the sea *ex adverso* of the lands of Fernoch, commonly designated and known as Fernoch Bay, in the said parish of Inverchaolain and county aforesaid, and within one mile of low-water mark, and that by means of a boat and net, or some other engine or engines, and without having a legal right or permission from the said Colonel Duncan Campbell, the proprietor of the said lands of Fernoch and of the salmon fishings in the sea *ex adverso* of the said lands of Fernoch, whereby the said Hugh O'Neill and William O'Neill are each liable to forfeit and pay a sum not less than ten shillings and not exceeding five pounds sterling for the said offence, over and above forfeiting the said boat and net used in taking, fishing for, or attempting to take fish of the salmon kind as aforesaid, with expenses; and failing payment of the said penalty with expenses to be decerned for within fourteen days after conviction, then to be recovered by poinding and imprisonment, for a period at the discretion of your Lordships, not exceeding one month.'

1883.

No. 39.  
O'Neillsv.  
Campbell.High Court,  
July 18.

Appeal.

The following was the conviction :—

The Sheriff-substitute, in respect of the evidence adduced, convicts the said Hugh O'Neill and William O'Neill *of the offence charged*, and therefore adjudges them to forfeit and pay the sum of One Pound sterling each of penalty, with the sum of One Pound sterling each of expenses; and in default of payment thereof within fourteen days after conviction, grants warrant for recovery of the said sums by poinding of their goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant; And appoints a return or execution of such poinding and sale to be made within eight days from the expiration of the period herein allowed for payment, under certification of imprisonment for the period of seven days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report, and declares the boat and net mentioned in the complaint to be forfeited.

Upon this conviction being pronounced, Hugh and William O'Neill obtained a Case stated on appeal, which, after narrating the above complaint and conviction, set forth that—

The agent for the appellants on being asked replied that he had no objections to state to the relevancy of the complaint, and the appel-

1883.  
—  
No. 39.  
O'Neill  
v.  
Campbell.  
High Court,  
July 18.  
Appeal.

lants having pleaded not guilty, proof was adduced, and the facts proved in evidence were :—On the morning of Wednesday, 16th May, having reason to believe that poaching by splashing for sea trout was going on, Mr Campbell, younger of South Hall, and his brother Mr John Campbell, accompanied by Duncan Sinclair, gamekeeper, Dugald Turner, and Donald Gilchrist, started from Colintrave Peir in a four-oared boat. When they reached Fernoch Bay, about 1.30 A.M., they heard sound of a boat in the bay—the sound, according to one witness, resembling that made by taking a net out of the sea on board. They rowed towards the sound, and found a boat with two occupants, five to ten yards from the shore, whom they identified as the appellants. It was stationary at the time, but on observing the approach of the four-oared boat it rowed out to mid-channel. The four-oared boat pursued and gained rapidly upon it, and as it got near Hugh O'Neill emptied a basket of fish into the sea. As the four-oared boat got close to the other, Hugh O'Neill, who had a pole in his hand, said he would knock the head off any one who attempted to enter his boat. Colonel Campbell's two sons boarded the boat, followed by Dugald Turner. The latter found a sea-trout in the bottom of the boat, which he put into his pocket, and afterwards handed it to the police constable at Colintrave. There was also found an ordinary *splash net*, mounted in the way that these nets are when used for sea trout. It was quite wet, and there were scales of sea trout on it. At least one other fish, either a skate or a flounder, was in the boat. The basket from which the fish had been emptied into the sea had sea trout scales on it. Colonel Campbell's sons and their party took the boat containing these with Hugh O'Neill and his son to Colintrave, where they handed them over to the police constable, who took the two men before Dr Mackenzie, J.P., Tighnabruaich, who granted a warrant to detain the boat and net.

The fish thrown overboard, the witnesses (though not prepared to swear to it) had no doubt, were sea trout, giving as their reasons that from their silvery appearance they must have been either sea trout or herrings; and that on the net and basket found in the boat scales of sea trout were found, and a sea trout was found in the bottom of the boat; also the fact of the men throwing fish overboard when approached.

Two witnesses were examined in exculpation, whose evidence showed that they were well acquainted with Fernoch Bay, and had often fished for herring there, had seen large quantities of herrings caught there, and that it was a good place for catching herrings in. They had seen nets for catching herrings mounted in the same way as the one found in the appellant's boat was described to have been mounted, viz., with corks on the top and lead at the bottom. Such nets were frequently used at Ballantrae. These are the principal facts that I remember, and on which I decided the case.

There were no points of law submitted for decision by the Sheriff-substitute at the trial.

The question was whether, on the evidence above narrated, the appellants were guilty of a contravention of the statute libelled on.

1883.

No. 39.  
O'Neillv.  
CampbellHigh Court,  
July 18.

Appeal.

R. V. CAMPBELL, for the appellants.—The conditions of the enactment in the statute libelled, which must be fulfilled in order to a conviction being obtained under it, are that there shall be a wilful taking proved, and also that that shall be done without legal right. From the facts stated in the Case, it does not follow that the appellants were proved to have been at Fernoch Bay on the occasion libelled designedly for the purpose of taking fish of the salmon kind. The Sheriff says that the facts stated in the Case are all the facts which he found proved, and upon which he founded his judgment. There is no statement or finding regarding the title to the fishings, and it is not said that it was proved that Colonel Campbell was the proprietor of the fishings. The Sheriff, we contend, mistook the law when he held that mere notoriety of the existence of a title to the fishings is a sufficient basis upon which to rest a conviction under this statute, and that he was entitled to convict upon proof of fishing without any evidence of the title to the fishings being produced. It was at the foundation and the essence of the case that Colonel Campbell should be proved to have been *in titulo* of the fishings, and his titles should have been produced.

LORD YOUNG.—Do you mean to contend that anyone is entitled to call upon a man to produce his title-deeds to a Magistrate who is trying a poacher.

R. V. CAMPBELL.—I do so contend, in prosecutions under this particular statute.

LORD YOUNG.—That is extravagant.

R. V. CAMPBELL, for the appellants.—But the conviction is, we contend further, bad, because it is a general conviction, convicting the appellants merely '*of the offence charged*,' whereas the complaint is alternative. It charges them with wilfully taking salmon, &c., or

1883.

No. 39.

O'Neill's

v.

Campbell.

High Court.  
July 18.

Appeal.

alternatively fishing for, or attempting to take salmon, &c., in or from the bay libelled. The appellants are entitled to be made aware whether they have been found guilty of fishing for and taking, or caught, fish, or of having attempted to do so merely; for although the statute punishes the attempt equally with the successful attempt, it might make a difference to the accused with reference to a second prosecution, whether they had been convicted of the one alternative or of the other. *Jones & M'Ewan v. Mitchell*, High Court, Dec. 23, 1853, Irv., vol. i., p. 334; *Charleson v. Duffes*, High Court, June 10, 1881, Couper, vol. iv., p. 470; *De Banzie v. Peebles*, High Court, March 16, 1875, Couper, vol. iii., p. 89.

LORD YOUNG.—Taking the law to be so. The fact proved in the Case, and of which you were convicted, was the fishing for salmon, or fish of the salmon kind, in this bay without legal right, and the fact which you say was left uncertain by the conviction was whether any fish were caught. The rule being, as laid down in *De Banzie's Case* quoted, that the fact which forms the ground of conviction must be so stated—either in the complaint itself or in the conviction by reference to it—as to enable the Court to see that it warrants the convictions, and applying that rule to this case, when we turn to the statute here libelled, we find that the uncertain fact, which you call an alternative, viz., the result of your act, is not a fact which is declared to form a ground for conviction, but, on the contrary, a fact which, by the enactment, is made altogether immaterial. The attempt to fish, it is declared, equally with the successful act, imports the offence, and infers the like penalties. It is therefore immaterial to the validity of the conviction that it should either bear upon its face or set forth referentially the fact whether fish were caught or not. The fact which must appear is that the accused was found fishing without legal right at a place falling within the description of those specified in the statute.

Counsel for the respondent was not called upon to reply.

The LORD JUSTICE-CLERK.—It appears to me that the question which has been argued is not before us at all, and I very much doubt whether we can competently consider the Case, because it is only on questions of law that the Sheriff is allowed to state a Case, and here the Sheriff-substitute states that no question of law was raised before him. I am rather disposed, therefore, to deal with the Case on that footing. But if it be competent for us to consider the question, I cannot say that I see any well-founded objection to the form of the conviction. It is said that the complaint is charged alternatively, and that the conviction is general, but I do not think that there is any validity in that objection. I am of opinion that there is no proper alternative in the complaint here. Perhaps the offence is not very accurately expressed in the Act of Parliament, but the substance of the thing is fishing for salmon. The result is of no moment—whether it be successful fishing or not, it does not increase the criminality of the offence, or the amount of the punishment following on it. The Legislature says that the attempt to fish without the permission of the proprietor, and within the prohibited territory, shall equally be a contravention of the statute with the actual fishing. The one is just as criminal as the other. I do not think, therefore, that this is an alternative charge in any proper sense, and consequently the general conviction following on it is perfectly well founded.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor :—

*‘Edinburgh, 18th July 1883.—Having considered this Case, and heard counsel for the parties, Dismiss the Appeal: Find the respondent entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the appellants.’*

1883.

No. 39.  
O’Neills  
v.

Campbell.

High Court,  
July 18.

Appeal.

Agent for the Appellants.—D. COOK, S.S.C.

Agent for the Respondent.—S. GREIG, W.S.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ANN BARR, or BELL, Suspender—*Nevay*.

AGAINST

DONALD M'PHEE, Respondent—*C. J. Guthrie*.

ALTERNATIVE CHARGE—GENERAL CONVICTION—ASSAULT—ST. and 30 VICT., CAP. CCLXXIII., SECS. 131 and 132 (Glasgow Po 1866)—REVIEW LIMITED TO CIRCUIT COURT.—A summary of assault (in the Glasgow Police Court) in so far as the accused at a certain time and place 'wickedly and feloniously assaulted on the face, or otherwise abuse' two persons 'to their injury respectively,' was followed by a general conviction of crime libelled.' The accused brought a suspension in the Court of Justiciary. The Court, repelling an objection to jurisdiction that the provisions of the Glasgow Police Act excluded review except to the Circuit Court, suspended the conviction (*diss.* Lord Justice-Clerk).

1883. ON 13th June 1883, before the Magistrate officiating at the Central Police Court, Glasgow, under The Glasgow Police Act, 1866, Ann Barr or Bell was charged in the instance of Donald M'Phee, Procurator-fiscal, with the crime of assault, in so far as she 'did, on the day of June 1883, or about that time, while in Buchanan Street, Glasgow, wickedly and feloniously assault, strike on the face, or otherwise abuse' two persons named and designed 'to their hurt and injury respectively,' whereby she incurred certain penalties in terms of The Glasgow Police Act, 1866.

She pleaded not guilty, but was convicted of the crime libelled, and sentenced to thirty days' imprisonment.

She thereupon brought a Bill of Suspension, which she pleaded, *inter alia*.

The conviction is inept in respect 'that the crime in the charge is not competently and sufficiently proved.'

No. 40.  
Bell  
v.  
M'Phee.  
High Court,  
July 18.  
Suspension.



stated. There is no specific statement to show how, or in what manner, or by what means the alleged assault was committed.' . . . 'Neither is there any specification of the nature or extent of the alleged abuse.' . . . 'The charge of abuse is not warranted by the statute, and the conviction therefore is incompetent and inept.' And further, in respect that the conviction is 'of the crime libelled' while the complaint charges two offences alternatively.

1883.

No. 40.  
Bellv.  
M'Phoe.High Court,  
July 18.

Suspension.

NEVAY, for the suspender.—This was an alternative charge followed by a general conviction, and the conviction consequently is bad.

LORD JUSTICE-CLERK.—Does that rule apply where the alternative is in the *modus*?

NEVAY, for the suspender.—Here the complaint is quite vague as to the *modus* of the offence, and the conviction being general, the accused is left in complete ignorance of what precise acts she has been found guilty of having committed. She is entitled to know that. As the conviction stands she is at liberty to consider herself guilty of having 'otherwise abused' these two women, but the 'otherwise' makes the charge bad from want of specification, while 'abuse' is not *per se* relevant, and is not made relevant by being coupled with the other alternatives.

GUTHRIE, for the respondent.—Unless it can be maintained that there was here a conviction of what is no offence at all, suspension or appeal is, in terms of the 131st and 132d sections of the Glasgow Police Act, 1866,<sup>1</sup> incompetently brought before this Court, the only

<sup>1</sup> Statute 29 and 30 Vic. cap. 273 (The Glasgow Police Act, 1866).

Section 131.—'No warrant granted by the Magistrate, or citation made in pursuance of the provisions of this Act, and no charge or complaint, and no proceeding or trial before the Magistrate, and no order or sentence of the Magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocacy, or appeal, or to any other form of review or stay of execution, unless in manner, and on some one or more of the grounds hereinafter mentioned.'

1883. mode of review competent being by way of appeal to the  
 No. 40. next Circuit Court [see section 132]. *O'Brien v. M'Ph*  
 Bell High Court, Oct. 30, 1880, Couper, vol. iv., p. 375. B  
 v. the complaint is perfectly relevant, and if the Magistra  
 M'Phee. had made the conviction specific the appellant cou  
 High Court, hardly have maintained her case. Although a Cou  
 July 18. having ordinary jurisdiction might, by scanning the co  
 Suspension. viction critically, find ground for setting it aside, the  
 is nothing so radically vitious about it as to let in th  
 jurisdiction of this Court. But taking it that this Cou  
 has jurisdiction, the conviction is perfectly good. It  
 a conviction of having assaulted these women by strikin  
 them or otherwise abusing them—not in words, b  
 physically.

LORD YOUNG.—As I observed in the course of t  
 argument, I am surprised to notice the difficulty whi  
 public prosecutors seem to find in comprehending th  
 very simple idea, that the safe way to state a charge  
 to state it copulatively and not alternatively. I pointe  
 out that if you have a copulative charge, and a genera  
 conviction follows, that is a conviction of the whol  
 offences that are charged, though, according to our law an  
 practice, it is not necessary, where a person is charge  
 with more than one offence, that he should be convicte  
 of the whole of these offences. But when you have a  
 alternative charge and a general conviction, it is impo  
 sible to say on which charge the Magistrate has convicted  
 and the cases are innumerable in which the convictio  
 has been set aside on this ground. As your Lordship  
 the chair observed during the discussion, where th

---

Section 132.—‘Any person who feels aggrieved by any order  
 sentence of the Magistrate may within fourteen days after its da  
 appeal to the Court of Justiciary at the next Circuit Court to be h  
 at Glasgow, in the manner, and under the rule, limitations, and c  
 ditions contained in’ the Act for abolishing heritable jurisdic  
 (20 Geo. II., cap. 43), ‘on the ground of corruption, malice, or opp  
 sion on the part of the Magistrate, wilful deviation in point of f  
 from the statutory enactments, incompetency, or defect of jurisdic  
 but on no other ground.’

alternative is an alternative as to the *modus*, that is not treated as of the same significance, but even then it is proper, or at least safe, to put it copulatively. In the familiar instance of the crime of assault, there is a specification of the particular acts of violence, and then the words ‘and did otherwise maltreat or abuse.’ That, according to my recollection, is the invariable practice. Here the *nomen juris* of the crime charged is no doubt assault. There is a major which states the crime by that *nomen juris*; but then the particular facts of which the particular instance of the crime is alleged to consist must be set out, and it is set out here that the accused did ‘wickedly and feloniously assault, strike on the face, or otherwise abuse,’ the two persons named. I put it to Mr Guthrie,—‘Do you propose to read in the copulative “and” or the disjunctive “or” between the words “assault” and “strike on the face?”’ He said he would prefer to read in the word ‘by.’ But you could not read in ‘by’ without altering the whole indictment, and so it must either be ‘and’ or ‘or’ which is to be inserted, and the obvious reading is of course ‘or’ according to the familiar rule of syntax by which only the last ‘or’ or ‘and’ is expressed as a symbol for the whole. Well, then the Magistrate by convicting the accused generally of the crime charged, says that she either assaulted or struck on the face, or otherwise abused these two women, and I am entitled to take it, or rather the convicted party is entitled to take it, that it is of the last of these three alternatives that she is convicted—that she is convicted of ‘otherwise’ abusing these two women. But how ‘otherwise’ I have not the least idea. The Magistrate does not tell us, and Mr Guthrie could not do so either. The rule of law is thus violated, which requires that either in the complaint or in the conviction the very facts of which the accused is convicted, and for which he or she is punished must appear, and not merely that something—not specified—occurred which in the opinion of the Magistrate amounted to the offence charged. I think therefore that we should be going

1883.

No. 40.

Bell

v.

M'Phee.

High Court,  
July 18.

Suspension.

1883. contrary to the principles so frequently affirmed  
 No. 40. decisions of this Court if we were to sustain this  
 Bell tion, which accordingly, I am of opinion, must  
 v. M'Phee. aside.

High Court,  
 July 18.

Suspension.

LORD CRAIGHILL.—At first I was inclined to that this conviction might have been sustained with perfect safety to the ends of justice, as there could be little doubt as to what was intended by it, but, in the end, I have come to agree with Lord Young. There is no doubt a liberty or licence allowed to prosecutors in Police Courts, but there is no excuse for the irregularity that has occurred here, and I think we should be careful not to go too far, and might be doing something which would be attended with danger to the lieges, if we were to allow general convictions, proceeding on complaints framed in that now before us.

LORD JUSTICE-CLERK.—I do not in the least dissent from your Lordships as to the rule to be followed in a case of proper alternative charges, but I must own I think this a very slender example. I think the alternative is not in the charge but in the *modus*, and that what is meant is, that the accused committed an assault on other women by striking them either on the face, or some other part of their persons, not the face. That is the substance of what is intended, and I think it is sufficiently set forth, although in a somewhat slovenly manner. I think that the public prosecutor was entitled to frame his complaint in this alternative manner, and that the Magistrate was entitled to convict in this general manner. At the same time, I do not express my opinion strongly; it is so easy for the public prosecutor to frame his complaint in plain terms what he meant to charge, and for the Court to find of what he meant to convict, that I hope this decision may prove a wholesome example for the future.

The following was the Interlocutor :—

‘ *Edinburgh, 18th July 1883.*—Having considered this Bill, and heard counsel for the parties, pass the Bill. Suspend the conviction and sentence complained of.

*simpliciter*, and decern: Find the complainer entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent.'

1883.

No. 40.  
Bellv.  
M'Phee.High Court,  
July 18.

Suspension.

Agent for the Suspender—JAMES BARTON, S.S.C.

Agents for the Respondent—Messrs CAMPBELL &amp; SMITH, S.S.C.

Present,

THE LORD JUSTICE-CLERK.

HER MAJESTY'S ADVOCATE—*Brand, A.-D., and R. V. Campbell, A.-D.*

AGAINST

ALEXANDER GOLLAN AND OTHERS—*Dean of Faculty (Macdonald),  
M'Kechnie, and Kennedy.*

MOBBING AND RIOTING—ASSAULT ON OFFICERS OF LAW—BREACH OF THE PEACE—SABBATH DESECRATION—SUNDAY RAILWAY TRAFFIC.—Circumstances in which ten persons, who assembled with a crowd at a pier for the purpose of preventing what they considered to be Sabbath desecration, by overpowering the police, and riotously and tumultuously preventing the unloading at said pier upon a Sunday of fish from steamboats for transmission by rail, were convicted of mobbing and rioting, and received sentence of imprisonment for four calendar months.

ALEXANDER GOLLAN or GOLLON, labourer, Slumbay, JOHN MACKENZIE, crofter there, DONALD M'RAE, DONALD MATHESON, and RODERICK GILLIES, fishermen at Ardneaskan, FINLAY MACKENZIE, boatman, North Strone Ferry, ALEXANDER M'KAY, tailor, Jeantown, all in the parish of Lochcarron, and county of Ross, RODERICK FINLAYSON, labourer, Ardnarff, ALEXANDER FINLAYSON, residing there, and JOHN MACRAE, residing at Portnacullin, all in the parish of Lochalsh, in said county, were indicted and accused of the crime of mobbing and riot-

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.High Court,  
July 23 & 24.Mobbing,  
Rioting, &c.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

ing; as also assault, especially when committed on officers of the law engaged in the execution of their duty; also breach of peace.

IN SO FAR AS, on the 3d day of June 1883, or on one or other of the days of that month, you did, all and each or one or more of you, along with a mob or great number of riotous and evil-disposed persons, of which all and each or one or more of you formed a part, in a riotous and tumultuous manner, and in breach of the public peace and to the alarm of the lieges, assemble at or near or upon the railway pier at or near the railway station at Strome Ferry, in the parish of Lochalsh, and county of Ross, and which pier and the access thereto is the property or in the lawful possession of the Highland Railway Company, incorporated by Act of Parliament, for the unlawful purpose of preventing by force the unloading or discharging of cargoes of fish on board of the steam vessels *Harold* and *Loch*, then lying alongside the said railway pier, and the conveyance of said cargoes to the said railway station for further carriage therefrom on the said 3d day of June 1883, or for some other unlawful purpose to the prosecutor unknown; and the said mob or great number of riotous and evil-disposed persons being armed, or then and there armed themselves, in pursuance of their unlawful purpose above libelled, with staves of barrels, walking sticks or bludgeons, or other weapons to the prosecutor unknown, did, then and there, conduct themselves in a violent, riotous, and tumultuous manner, in breach and to the disturbance of the public peace, and to the terror and alarm of the lieges, and did forcibly and unlawfully take possession of the said railway pier and the access thereto, and did forcibly and unlawfully maintain possession of the same for the space of twenty-four hours thereby on the said 3rd day of June 1883, and did, during the said day, forcibly and unlawfully prevent the unloading of the said cargoes from the said steam vessels, and the conveyance thereof to the said railway station for further carriage therefrom; and farther, did, then and there, wickedly and feloniously, attack and assault Donald Munro, then and now or lately chief constable of Ross and Cromarty and Roderick M'Lean, now or lately chief constable for Sutherland and residing in Dornoch; Roderick Munro, now or lately sergeant of police, residing at Canon Bridge, in the parish of Urquhart, county of Ross; William MacKenzie, now or lately sergeant of police, residing at Jeantown, in the parish of Lochcarron, and county of Ross; William Urquhart Macleod, now or lately police constable, residing at Strathpeffer; Finlay Aird, now or lately police constable, residing in Dingwall; Alexander M'Pherson, now or lately police constable, residing in Dingwall; and Kenneth Cameron, now or lately police constable, residing in Dingwall, all or one or more of them, who were then and there endeavouring, in the execution of their duty as officers

of the law, to put a stop to the aforesaid riotous and illegal proceedings, and did struggle with them, and did strike them, all or one or more of them, several or one or more blows with their fists, and with the weapons aforesaid, on the head, arms, and other parts of their persons, and did otherwise maltreat and abuse them, or one or more of them, whereby they, or one or more of them, were injured in their persons; and all this, or part thereof, the said mob or great number of riotous and evil-disposed persons did, in pursuance of the unlawful purpose above libelled, or other unlawful purpose to the prosecutor unknown, and well knowing that the said Donald Munro, Roderick M'Lean, Roderick Munro, William Mackenzie, William Urquhart Macleod, Finlay Aird, Alexander M'Pherson, and Kenneth Cameron were constables or officers of police, or other officers of the law, and then and there engaged in the execution of their duty as aforesaid; and you, all and each or one or more of you, formed part of the said mob or great number of riotous and evil-disposed persons, and were, all and each or one or more of you, present at and aiding and abetting and actively engaged with the said mob or great number of riotous and evil-disposed persons, in the acts of mobbing and rioting, assault, and breach of the peace above libelled, or part thereof: [The declaration of each of the panels was then libelled in the usual form]; as also a document, titled on the back 'Foreshore Lochcarron Feu Disposition by the Board of Trade in favour of the Dingwall and Skye Railway Company, 1880,' or similarly titled, being to be used in evidence against all and each or one or more of you, &c.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

The panels pleaded not guilty, and a jury having been empannelled, the following special defence was read:—

The accused 'plead generally not guilty to the charges in the libel, and specially that on the occasion libelled the people assembled at the place libelled, including the accused, were not there for an unlawful purpose, but were there for the purpose of remonstrating against, and by lawful means preventing, the desecration of the Sabbath day by unnecessary labour carried on to the annoyance of the lieges, and in violation of the feelings of the population of the district.'

The main facts proved were, that on Sunday, 3d June 1883, the accused, along with a crowd of other persons numbering from 50 to 150 or 200, assembled at the Strome Ferry Pier, the western terminus of the Highland Railway at Lochcarron, armed with sticks or bludgeons



1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

and barrel staves, and on the arrival of the steam vessels *Harold* and *Lochiel*, with cargoes of fresh and kippered herrings for immediate conveyance by rail south for the Manchester and London markets, they took forcible possession of the pier and of the access thereto, and maintained possession for the whole twenty-four hours of said Sunday, the 3d of June, and forcibly prevented the unloading of said cargoes of fish from said steam vessels and their transmission and conveyance by rail. It was also proved that they assaulted Donald Munro, chief-constable of Ross and Cromarty shires, Roderick M'Lean, chief-constable of Sutherlandshire, Roderick Munro, and William M'Kenzie, sergeants of police in the county of Ross, William Urquhart Macleod, police constable, Strathpeffer, and Finlay Aird, Alexander M'Pherson, and Kenneth Cameron, police constables, Dingwall. The attacks on the police force were made when the officers endeavoured (acting under orders) to clear the place and put a stop to the proceedings of the crowd.

The particular method pursued by the crowd assembled on the pier was to watch when a railway waggon, intended to receive boxes of fish, was put below the steam crane used for lifting the boxes out of the vessels, and to push it away before it received any boxes. This effectually stopped the unloading, as the boxes could not otherwise be got away. A further method adopted was to prevent the railway and steamboat servants on the pier from getting near the steam crane to work it.

The crowd was at first small and unexcited, but gradually increased in numbers upon signals from those on the pier, until not fewer than 200 men were on the pier together, and the excitement increased with every attempt that was made to proceed with the discharge of the vessels, and to prevent the crowd carrying out its desires.

It also appeared that when the riot began there were no police present, but that when they arrived, and particularly when they began to act, recourse was had

to stone throwing and other acts of assault, coupled with threats to throw or push the police constables over the pier into the water, or on to the deck of one of the steam vessels.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

All the accused were identified as having formed part of the crowd, and some of them as having been particularly active and as having led on the others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

The crowd was largest about 2 o'clock on said Sunday morning, when the *Lochiel* came in, and again between 10 and 11 in the forenoon, when the police arrived. At each of these hours there were not fewer than 200 men collected. The police were only eight in number all told, and being unable to contend with the crowd were withdrawn, and the crowd accordingly succeeded in their purpose. With the lapse of Sunday the crowd withdrew all opposition to the transmission of the boxes of fish.

The assaults committed were not of a serious character.

The declarations of the accused were read to the Jury. In them the accused admitted, with more or less distinctness, that they had been present at the pier on the occasion in question with a number of persons, to prevent the Railway Company carrying on their traffic on Sunday, and that they asked the police by what authority they were preventing them from protecting the Sabbath.

Counsel for the prosecution and for the defence having addressed the Jury,

The LORD JUSTICE-CLERK, in charging, said — Gentlemen of the Jury, you have heard from both sides of the Bar that this is a very important case, and its importance has not been diminished by the grounds upon which the defence has been taken. You have heard that the police, the representatives of the law, were violently prevented from doing what they believed to be, and what they were instructed to believe to be, their duty. Whatever may be the merit of the very important questions which have been treated by the Dean of Faculty, you will easily

1883. understand that in this country, where the law is an  
 ought to be omnipotent, and where its remedies are  
 accessible to all, it is no light matter—it never can be  
 regarded as a light matter in any part of the empire—the  
 the officers of the law shall be forcibly prevented from  
 doing what they have been instructed to do. It does  
 not in the least diminish the gravity of the case that the  
 question has been raised as to whether the object, which  
 the persons who committed the offence had in view, was  
 or was not one which they might plead actually conform-  
 ed to law, and might even be made effectual in  
 a Court of Law. The force that was used upon this  
 occasion without the authority of the law—in one case  
 with success—even supposing the object were laudable  
 and proper—might come to be used on another occasion  
 in a totally different direction. There is not the  
 slightest protection for property, for freedom, or for  
 ordinary social and individual life, excepting the law of  
 the land. The law of the strongest is the law of tyranny.  
 Obedience to the law of the land is the sole safeguard of  
 constitutional liberty. I have made these remarks, gentlemen,  
 to bring your minds back to the importance  
 of the case. The Dean of Faculty has said that a little  
 common sense would have settled this case; perhaps it  
 might have, and perhaps it might not. But, meanwhile  
 passing from that aspect of the case, I would ask your  
 attention to the simple question, viz., Whether the  
 panels have committed the crimes stated in the libel.  
 Mobbing and rioting consists in a combination of persons  
 for a common purpose to attain an object which cannot  
 be attained without numbers, and an object to be effected  
 by reason of the numbers—that is, by force. In the present  
 case, the object of the combination was to prevent  
 certain traffic on the Sabbath day, viz., the landing of  
 fish at the pier libelled. And apparently that object was  
 not only avowed, but defended. Gentlemen, as matters  
 of law, I have to tell you that if the accused did so, and  
 more especially, if they intended to resist, that const-

No. 41.  
 Alexander  
 Gollan or  
 Gollon and  
 Others.

High Court,  
 July 23 & 24.

Mobbing,  
 Rioting, &c.

tuted the offence of rioting. If the facts are as the prosecutor has stated them, there can be no doubt at all as to the result. There is no doubt that the prisoners went there to prevent the railway company from carrying on Sunday traffic—and to do so by force ; and they were tumultuous enough to constitute the offence charged against them. It does not appear to me that there is anything for you to consider in the way of facts. The facts are clear enough. The defence is that the traffic was unlawful, and if the object of the panels had been one which they were entitled to effect in the way they did, that would have been a good defence. But no man in this country is entitled to take the law into his own hands ; and no man is entitled to resist the officers of the law ; and therefore the combination in numbers, in order to overawe the officers, and, at their own hands, and, on their own authority, to prevent persons from using their own liberty in carrying traffic, is a thing which common sense will tell you it is impossible to allow. If Sunday traffic at Strome Ferry is contrary to the law, the law is open to the meanest inhabitant of the country. If it is an outrage upon the law, the law will lend support in putting an end to it. There is no person in this country so high as to be beyond the law ; and there is no person so humble as not to be able to put the law in operation. But the idea on the part of the panels that persons are entitled first to decide for themselves as to the lawfulness or unlawfulness of their neighbour's acts which do not directly or legally affect them, and, in the next place, to proceed to carry out their views simply by force, and in spite of the law to the contrary, I have never heard before pleaded in a court of justice. And with reference to this particular matter—viz., how far traffic on the Sabbath is or is not lawful—there are various shades of opinion. I have my own opinions and hold them strongly ; but I could not insist on others holding them as strongly, on the one hand, nor could I insist upon their holding them still more strongly than they do. I

1883.

---

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

---

High Court,  
July 23 & 24.

---

Mobbing,  
Rioting, &c.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

think, gentlemen, you will see at once that while the men had strong and creditable opinions on the subject of the sanctity of the Sabbath—opinions which to a large extent the whole community among which they lived held—that if those who did not hold them were to follow the plan adopted by the prisoners, we might be landed in very grave complications. If, in point of fact, the Sunday traffic at Strome Ferry was contrary to the law of the land, that law was quite able to put an end to it. And if those persons thought that this was an outrage on the community, and was an outrage which the law would support them in putting down, they should have tried it. There are some persons who have strong opinions about the opening of public places on Sunday, and others strongly oppose that measure, and both sides are equally strong. Is the one side entitled to have a mob to break into these places, and is the other side entitled to have a mob to prevent this? If such proceedings could be tolerated, it is evident that very serious cases would arise. There was an instance the other day which is not an inapt illustration of this in the case of the Salvation Army. In the case before us the facts are not disputed. The assault charged was in its result nothing serious; but the fact that the police officers had to withdraw is a very serious matter indeed. I strongly urge you to throw out of view entirely the question as to how far the Sunday traffic of a railway company is or is not authorised by law. Whether the landing of fish at Strome Ferry is within the statute against the profanation of the Sabbath or not, it cannot be stopped by the method adopted by the prisoners. The question for you, gentlemen of the Jury, is not and cannot be whether the operation is or is not struck off by the old statutes I refer to, and it is of no moment as to the questions raised in the indictment whether it is or is not. In any event the prisoners were not entitled to enforce what was the law of the land by mobbing and rioting. The question which you have to consider

whether the prisoners were entitled by force, at their own hands, to stop the operations of the railway company, and, in breach of the peace, resist the officers? I feel for the men who seem to have been misled as to the authority in this matter. That is not an infrequent phase of such cases. They are respectable men, and I have not the least doubt they thought they were doing a service to the community. However much, gentlemen, your sympathies may be with the men at the Bar, you have manfully to do your duty, and conscientiously return such a verdict as will meet the necessities of the case.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

The following was the verdict :—

‘ The Jury unanimously find the panels guilty of mobbing and rioting as libelled, but recommend them to the utmost leniency of the Court on account of their ignorance of law and the strong religious convictions they hold against Sabbath desecration.’

Sentence having been delayed, the following day,

KENNEDY, for the prisoners, said—I have, my Lord, on behalf of the prisoners, to express their deep regret and their thorough penitence that an excess of zeal in pursuit of an object, by them believed to be lawful, and perhaps laudable, betrayed them into what your Lordship has authoritatively laid down to be a breach of the criminal law of the country. That declaration of your Lordship will have the best effect in preventing, on the part of them and of those in the neighbourhood, to which I hope they will be allowed to return, any other lapse from what is, I venture to say, the usual tenor of a God-fearing and law-abiding people. Justice has been vindicated by the verdict of the Jury. As to what may follow upon that verdict, the sympathy which your Lordship, while condemning their illegal conduct, has generously expressed to the prisoners, and the unprecedentedly strong recommendation of the Jury, so eminently in harmony with that expression of sympathy, render it superfluous, if not perhaps presumptuous, for me to say anything as



1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

to the punishment which your Lordship, in the exercise of the utmost leniency of the Court, would be disposed to inflict. I do not venture to inquire whether the utmost leniency of the Court may not point to an admonition or to the infliction of a fine. I leave that, with the utmost confidence, in your Lordship's hands.

The LORD JUSTICE-CLERK, addressing the prisoners, said —The Jury, after full consideration, returned this verdict [reads]. The crime of which you have been convicted is that of mobbing and rioting, and I need not review the facts that were proved to the satisfaction of the Jury, and upon which their verdict has proceeded. The statement that has been made on your account this morning I heard with very great satisfaction, for it showed me that the proceedings in which we have been engaged yesterday and to-day have had the full effect for which all law is designed, and which all judicial proceedings are intended to accomplish. The question for me now is, what effect that can have on the sentence to be pronounced in respect of the breach of law, of which you have been found guilty. The Jury have recommended you to the utmost leniency of the Court, which means that they thought that the Court ought to give a large effect to the suggestions which they have made, in so far as that might be consistent with its duty to the public. It is always a most painful task on the part of those who occupy the place where I now sit when they have to apply the penalties of the law to persons of respectable lives, and all the more when the object on account of which crime was committed was one which seemed to them not to be blameworthy, but innocent. You yourselves admit that you were wrong. But, I repeat, it is one of the most painful tasks which a Judge can have to discharge when he has to apply the penalties that are generally reserved for the criminal class to men who, up to that time, have led respectable lives ; and I feel it very strongly. But notwithstanding that, I have a duty to discharge. An unlawful deed was done ; and although your expression



of regret, through the mouth of your Counsel, as I have said, fills me with great satisfaction, it cannot supersede the duty that I have to discharge. You are recommended to the mercy and the leniency of the Court on two grounds. The first is the strong religious convictions which you hold against Sabbath desecration. Now, I did not say yesterday, nor shall I now say, a single word upon that question so far as relates to the present counts. But I am quite ready to give such effect as I am able to the ground of recommendation on which the Jury proceeded. I am very far indeed from treating lightly any religious conviction on that subject. All conscientious religious conviction is entitled to respect. The Jury thought so, and I do not dispute it. I have nothing to say in regard to the immediate subject of this riot, because the other persons concerned are not here. I have no concern with what they are doing, and, if there is anything to say against it, they have not had an opportunity of replying to it. But I take it that for persons in your position to spend the day of rest from morning to night in illegal violence and unseemly demeanour was hardly the way to advance the cause you had at heart, or to inspire in others due respect and reverence for that sacred institution. In regard to the second ground, of ignorance of the law, that is a matter which I am also bound to think the Jury were well entitled to consider. Ignorance of law is not considered an excuse for crime. At the same time, in a question of motive, that is a matter to be taken into consideration ; so much so that if it had not been for the recommendation of the Jury and some other circumstances connected with this individual case, I should have to deal with the case more severely ; and if any other case of deliberate resistance to the law in circumstances at all similar should come hither, it will no longer be a ground of recommendation that the prisoners were ignorant of the law. The proceedings of this day will become notorious, and I think that for the future it

1883.

---

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

---

High Court,  
July 23 & 24.

---

Mobbing,  
Rioting, &c.

1883.

No. 41.  
Alexander  
Gollan or  
Gollon and  
Others.

High Court,  
July 23 & 24.

Mobbing,  
Rioting, &c.

will, at all events, be warning sufficient against the repetition of offences of that kind. Now, prisoners, I have considered this matter with great anxiety, because it is impossible for me, sitting here, for a moment to treat deliberate resistance to the law as anything but a very grave and aggravated offence. The very laws that protect you are the laws that you violated; and if it were for a moment to appear that it was a light offence, you can easily see that the whole social community would be disorganised; and so, if any such thing happened again, at least so far as I am concerned, it would be utterly impossible for me to listen to a recommendation founded on such a ground. I think you will see, and what has been said by your Counsel proves that you do, that resistance to the law in the end can terminate in nothing but disaster, and in very serious disaster, to yourselves. As to the sentence, I think perhaps you do not sufficiently consider what the effect of punishment is when applied to such persons as yourselves. But for this recommendation, I must have gone a good deal further in that direction, and must probably have inflicted a punishment which might have spoiled the lives of every one of you. As it is, the sentence that I shall pronounce, though it may seem lenient, is by no means nominal. Taking all the matters into consideration, I am able to restrict it more than I was at first inclined to do, and the sentence of the Court is that you be imprisoned for four calendar months.<sup>1</sup>

Agent for the Panels—JOHN CARMENT, S.S.C.

---

<sup>1</sup> This sentence was remitted on 21st September 1883.

## FULL BENCH.

The LORD JUSTICE-GENERAL.

The LORD JUSTICE-CLERK.

LORDS YOUNG, MURE, CRAIGHILL, and ADAM.

J. B. W. LEE, Appellant—*J. Campbell Smith and Rhind.*

AGAINST

THE LOCAL AUTHORITY OF LASSWADE—*The Dean of Faculty  
(Macdonald), and Shaw.*

APPEAL — COMPETENCY — PENALTY — CIVIL AND CRIMINAL — CAUSE, DETERMINATION OF — EXPENSES — STATUTE 30 and 31 VIC., c. 101, SECS. 18-22, 103-107, 108 (Public Health (Scotland) Act, 1867) — STATUTE 38 and 39 VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals (Scotland) Act, 1875) — SUMMARY PROCEDURE ACT, 1864, SECS. 3 and 28.—A Local Authority petitioned a Sheriff under the Public Health Act, 1867, to have the proprietor of certain houses ordained to remedy a nuisance alleged to exist. The Sheriff granted decree, finding that the nuisance existed, and ordaining the defender to execute certain remedial operations within a certain time, 'under certification that if the said decree be not complied with within the time appointed, the defender should be liable in the penalties enumerated in section 20 of the Act 30 and 31 Vic., c. 101 ; finds the defender liable in expenses,' &c.

The defender took a Case under the Summary Prosecutions Appeals Act, 1875.

The Local Authority objected to the competency, on the ground that appeal which was excluded by section 108 of the Public Health Act, 1867, had not been made competent under the Summary Prosecutions Appeals Act, 1875, inasmuch as the Case was not a 'cause' within the meaning of section 2 of that Act, and that if it was, it had not been 'determined' by the Sheriff in the sense of section 3, expenses not being a penalty, and no other penalty having been imposed.

Held that the appeal was incompetent, on the ground that if the petition was a cause within the meaning of section 2, it had not been finally determined in the sense of section 3 by the imposition of a penalty.

Opinions as to whether the penalties provided by section 20 of the Public Health Act, 1867, were penalties in the sense of section 2

of the Summary Prosecutions Appeals Act, and whether, if the were, they could be recovered in a petition which did not specifically pray the Sheriff for their imposition.

1883. THIS was an appeal under the Summary Prosecution  
 No. 42. Appeals Act, 1875, at the instance of JOHN BETHUN  
 Lee WALKER LEE, S.S.C., proprietor of certain houses calle  
 v. 'Lee's Buildings,' in the village of Loanhead, in th  
 Loc. Auth. of Lasswade. 'Lee's Buildings,' in the village of Loanhead, in th  
 parish of Lasswade, against an Interlocutor pronounce  
 High Court, in the Sheriff Court at Edinburgh (J. R. Baxter, adve  
 Nov. 2 cate, *interim* Sheriff-substitute for Mid-Lothian), upon  
 Appeal. petition under 'The Public Health (Scotland) Act  
 1867,' 30 and 31 Vic., c. 101, in the following terms:—

Petition in the Sheriff-Court of the Sheriffdom of the Lothians  
 Edinburgh. The Local Authority of the parish of Lasswade, pursuer  
 against John Bethune Walker Lee, solicitor, before the Supreme  
 Courts of Scotland, Edinburgh, and residing at Joppa, near Edin  
 burgh, defender.

The above-named pursuers submit to the Court the Condescendence  
 and Note of Pleas in Law hereunto annexed, and pray the Court,

To ordain the defender (1) to discontinue a nuisance within the  
 meaning of the 16th and 17th sections of the Act 30 and 31 Victoria  
 cap. 101, and which nuisance existed at the third day of August  
 1882, and still exists at the property consisting of dwelling-house  
 and others belonging to him, and which is called 'Lee's Buildings'  
 and is situated in the village of Loanhead, within the parish of Lass  
 wade and county of Edinburgh; (2) to provide sufficient privy and  
 ashpit accommodation and means of drainage for the said dwelling  
 houses, and to repair, make safe and habitable the foresaid houses, by  
 providing such accommodation, and thereafter to remove the present  
 privies; (3) to pave or lay with concrete or asphalt, having  
 suitable incline towards the drain, the whole area of the courtyard  
 and connected with the said property; (4) to remove entirely the  
 wooden erections presently used as stables at said property; and (5)  
 to provide a competent and responsible man who will, at least once  
 each day, or oftener if required, cleanse the whole of the said premises  
 from the filth and refuse thrown out of the houses, and empty the  
 privies and ashpits so that the same may be carted away by the cart  
 provided by the pursuers for that purpose, and that under such  
 regulations as may appear to the Court to be proper. And that  
 under the direction and subject to the approval of a person to  
 appointed by the Court, and so as to render the said property habitable

able as human dwelling places and free from nuisance : and further to grant interdict against the recurrence of any of the said nuisances, or to do further or otherwise as the case may in the judgment of the Court require : and further to prohibit the using of the said premises for the purpose of a human habitation until the same are rendered fit for that purpose, or to do otherwise as the case may in the judgment of the Court require : and to find the defender liable in expenses.

1883.  
 No. 42.  
 Lee  
 v.  
 Loc. Auth.  
 of Lasswade.  
 High Court,  
 Nov. 2  
 Appeal.

A Condescendence and Pleas in Law followed. In the Condescendence it was set forth that the application was founded on the 'Public Health (Scotland) Act, 1867,' and more especially sections 16 to 24, sections 105, 106, 108, and 110 to 119, all inclusive.

The following was the Interlocutor complained of:—

'*Edinburgh, 25th September 1882.*—The Sheriff-substitute having heard Counsel for the parties, and considered the whole process, productions and proof: Finds (1st) That at 3rd August 1882 there existed a nuisance within the meaning of the sixteenth section of the Act 30 and 31 Vic., cap. 101, at the property consisting of dwelling-houses and others belonging to the defender called "Lee's Buildings," and situated in the village of Loanhead, within the parish of Lasswade and county of Edinburgh; (2nd) That the said nuisance was caused by the defender failing to provide sufficient privy and ashpit accommodation and means of drainage for the said dwelling-houses; (3rd) That the said nuisance is likely to recur: Accordingly ordains the defender [here followed a number of remedial operations ordered to be carried out within a specific time], and to execute the other works herein ordered prior to the first day of December eighteen hundred and eighty-two, under certification that if the said decree be not complied with within the time appointed, the defender shall be liable in the penalties enumerated in section 20 of the Act 30 and 31 Vic., cap. 101: Finds the defender liable in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report: Further sanctions the employment of Counsel, and decerns.'

At the first calling of the Case before the High Court, the respondents, the Local Authority, objected to the competency of the appeal on the ground that it was excluded by section 108 of the Public Health (Scotland) Act, 1867; and after the parties had been heard before

1883. the Lord Justice-Clerk, Lords Young and Craighill, the  
 No. 42. Case was continued for a hearing before a full bench.<sup>1</sup>  
 Lee  
 v.  
 Loc. Auth.  
 of Lasswade. J. CAMPBELL SMITH and RHIND, for the appellant  
 High Court, argued—This is an appeal under the Summary Prosecu-  
 Nov. 2. tions Appeals Act, 1875, against a judgment pronounced  
 Appeal.

<sup>1</sup> Statute 30 and 31 Vic., cap. 31 (The Public Health (Scotland) Act, 1867).

Section 18.—‘In any case where the existence of a nuisance ascertained to the satisfaction of the Local Authority,’ . . . ‘and although the same may have been since removed or discontinued, in their opinion, likely to recur or to be repeated, they may apply to the Sheriff or to any Magistrate or Justice by summary petition, in the manner hereinafter directed, and if it appear to his satisfaction that the nuisance exists, or, if removed or discontinued,’ . . . ‘that it is likely to recur or to be repeated, he shall decree for the removal, remedy, or discontinuance, or interdict of the nuisance.’ . . .

Section 19.—‘It shall not be necessary to restrict such decree to any special remedy prayed for in the petition, but, as the case shall require, the author of the nuisance, or owner of the premises, may be ordained to provide sufficient privy or water-closet or ashpit accommodation, means of drainage, or ventilation for, or to repair, make safe and habitable, or to floor, pave, cleanse, whitewash, disinfect, or purify the dwelling-house,’—[and then follow a number of other similar operations according to the nature of the nuisances complained of]—‘or to do such other works and acts as are necessary to remove the nuisance complained of, in such manner, and within such time, as the interlocutor shall be specified; and if the Sheriff, Magistrate, or Justice is of opinion that such or the like nuisance is likely to recur, he may further grant interdict against the recurrence of it, or do otherwise as the case may, in his judgment, require.’ . . .

Section 20.—‘If the said decree be not complied with in good and sufficient manner, and within the time appointed, the author of the nuisance or the owner, as the case may be, shall be liable,’ [in the case of the nuisance here in question], ‘to a penalty of not more than ten shillings per day during his failure so to comply, and, if said interdict be knowingly infringed by the act or authority of the owner or occupier, such owner or occupier shall be liable for every such offence to a penalty not exceeding twenty shillings per day during such infringement.’ . . .

Section 22.—‘In case of non-compliance with, or infringement of, any decree aforesaid, the Sheriff, Magistrate, or Justice may, on application by the Local Authority, grant warrant’ for remedying the nuisance at the expense of its author or the owner of the premises.

in the Sheriff Court at Edinburgh, upon a summary complaint brought under the Public Health Act, 1867. When the Case was first called before the High Court, parties were heard before the Lord Justice-Clerk, Lords

1883.

No. 42.

Lee

v.

Loc. Auth.  
of Lasswade.High Court,  
Nov. 2.

Appeal.

Section 103.—‘ All penalties under this Act, and also all sums of money and expenses herein directed to be recovered in a summary manner, may, unless otherwise provided in this Act, be recovered at the suit of the Local Authority, and may be applied for the purposes of this Act; provided always that nothing contained in this section shall impair or affect any other mode of recovery allowed by this Act.’ . . .

Section 105.—‘ All applications to enforce any provision of this Act, or for the recovery of penalties herein imposed, or other sums of money becoming due to the Local Authority in virtue of this Act, in so far as not herein otherwise provided for, may be by summary petition ’ (then follow directions as to the procedure in such petitions down to decree); and the Sheriff, Magistrate, or Justice ‘ may find either party liable in expenses, or in any modified sum of expenses, and may, without prejudice to diligence by poinding or arrestment, grant warrant for the imprisonment of the person convicted or found liable in a penalty or sum of money, unless he shall pay the whole sums found due within a specified time, until the same be paid, such imprisonment not to exceed a specified time, but the judgment shall not be invalidated by any deviation from any of the said periods of time.’

Section 107 gave a right of appeal in the case of certain nuisances, of which that here alleged to exist was not one.

Section 108.—‘ No appeal shall be competent from any decree or order of any Magistrate or Justices, or from the decree or order of any Sheriff, except in cases certified in terms of the preceding section; and no decree or order, or any other proceeding, matter, or thing done in the execution of this Act, shall, excepting as herein provided, be subject to review in any way whatever.’

Statute 27 and 28 Vic., cap. 53 (The Summary Procedure (Scotland) Act, 1864).

Section 3.—‘ The provisions of this Act may be applied to—(1) All proceedings before any Sheriff, Justices or Justice, or Magistrate in Scotland, in virtue of the summary jurisdiction conferred upon them, or any of them, in relation to the trial of offences and recovery of penalties by the recited Acts or any of them; (2) all proceedings to be taken before any Sheriff, Justices or Justice, or Magistrate in Scotland for the prosecution of any person who has committed, or is charged



1883.  
 No. 42.  
 Lee  
 v.  
 Loc. Auth.  
 of Lasswade.  
 High Court,  
 Nov. 2.

Appeal.

Young and Craighill, upon the question of the competency of the appeal, and the Case was continued in order that the discussion on that question might be heard on the present occasion before a full bench. The prosecu-

with having committed, any offence or act for which, under the provisions of any Act of Parliament, he is liable, upon summary conviction before any Sheriff, Magistrate, Justices or Justice, to be imprisoned, fined, or otherwise punished, or to be ordered to do or perform any act, and to be imprisoned in default of performance; (3) all proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament, may be recovered by summary complaint or information, or by poinding or distress and sale, or other summary process or diligence of the like nature, before any Sheriff, Justices or Justice, or Magistrate; (4) all proceedings for the trial or prosecution for any offence, or for the recovery of any penalty, under any Act of Parliament by which it shall be provided that offences committed in contravention thereof, and penalties thereby imposed, shall be prosecuted or recovered under the provisions of this Act.'

Section 28.—' And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament authorising convictions for offences and the recovery of penalties, and the enforcement of orders by imprisonment, upon summary complaint before Sheriffs, Justices and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature, when in pursuance of a conviction or judgment upon such complaint, or as part of such conviction and judgment, the Court shall be required, or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty, or expenses, or in case of disobedience to the order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament, the jurisdiction shall be held to be civil.' . . .

Statute 38 and 39 Vic., cap. 62 (The Summary Prosecutions Appeals Act, 1875).

Section 2.— . . . "Cause" means and includes every pro-

tion originated in a summary petition before the Sheriff-substitute under section 105 of the Public Health Act. The petition concludes that Mr Lee be ordained (1) to discontinue a nuisance which it was alleged existed at certain dwelling-houses belonging to him in the village of Loanhead; (2) to provide privy and ashpit accommodation and means of drainage for said dwelling-houses, &c.; (3) to pave a court; (4) to remove a wooden stable; (5) to provide a man to clean out the said privies, &c., daily, and that all under direction of a person to be appointed by the Court. 'And further to grant interdict against the recurrence of the nuisance, or to do further or otherwise as the case may require, and to find the defender liable in expenses.'

1883.  
No. 42.  
Lee  
v.  
Loc. Auth.  
of Lasswade.  
High Court,  
Nov. 2.  
Appeal.

The judgment pronounced, and which is complained of, found, in terms of these conclusions—1st, That the nuisance existed at 3rd August 1882; 2nd, That it was caused by the defender as author; 3rd, That it was likely to recur. It then ordained him to execute certain works, and do certain specified things within a specified time, all as concluded for, 'under certification that if the decree be not complied with within the time appointed, the defender shall be liable in the penalties enumerated in section 20 of the Act 30 and 31 Vic., c. 101,' and it concluded, 'Finds the defender liable in expenses: Allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report.' Now

---

ceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge.'

Section 3.—'On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment or conviction, or complaint under such Act.' . . .

1883.  
No. 42.  
Lee  
v.  
Loc. Auth.  
of Lasswade.  
High Court,  
Nov. 2.  
Appeal.

we admit that if we were compelled to rely upon the provisions of the Public Health Act alone, we would be excluded from appealing by the prohibition in section 108 [see footnote, p. 333], and our contention is that, notwithstanding that prohibition, appeal is competent under the provisions of the Summary Prosecutions Appeals Act, 1875, 30 and 31 Vic., c. 101. Being dissatisfied with the determination of the Sheriff-substitute as erroneous in point of law, Mr Lee moved for and obtained the present Case on appeal stated in terms of the provisions in section 3 of that Act [see footnote, p. 335]; and the question of competency raised, therefore, is whether an appeal under sections 2 and 3 of that Act against such a judgment as the present, pronounced upon a summary petition brought *inter alia* under section 105 of the Public Health Act is competent. This latter section we contend contemplates that a penalty may be inflicted in the course of the procedure following upon such a petition or complaint; and there could be no other reason for founding upon that section unless to recover a penalty or a sum of money of the nature of a penalty such as expenses. The section warrants the imprisonment of a person found liable in a sum of money or expenses for a period limited, unless the same be paid [see footnote, p. 333]. Section 3 of the Appeals Act of 1875 [see footnote, p. 335], makes it competent 'on an inferior Judge hearing and determining any "*cause*"' (as defined by section 2) for 'either party to the cause, if dissatisfied with the Judge's determination as erroneous in point of law,' to 'appeal there-against, notwithstanding any provision contained in the Act under which the cause shall have been brought, excluding appeals:' and the 2d section, which is the interpretation clause [see footnote, p. 334], defines the word cause as meaning and including 'every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the

prosecution of an offence, or recovery of a penalty competent to be brought before an inferior Judge.' Looking therefore to the terms of this third section, the first question to be determined is, Does this judgment amount to a determination of the cause? because it is to such only that, in terms of that section, its provisions for appeal apply. And if the judgment be final, the next question is whether the cause in which it has been pronounced is one which falls within the definition of the word 'cause' in section 2—Is it a proceeding which may be brought under the Summary Procedure Act? or is it a proceeding which in terms of that definition is 'for the prosecution of an offence or recovery of a penalty'? We contend that it is a judgment which determined the cause, in respect that it settled the whole merits of it. There was no obligation to conclude expressly for a penalty, and although not concluded for, the Judge was not on that account prohibited from inflicting one. [See section 19 of the Public Health Act, footnote, p. 332.] A penalty could quite competently be decerned for upon a motion made in the course of the procedure under the petition; for although it is not directly concluded for, a penalty is warranted by the sections of the Act founded on, and it arises out of, and is involved in the proceedings under the petition. And as the orders *ad factum præstandum* in the judgment complained of, have not been complied with, our contention is that the penalty, although not decerned for, has, in terms of the certification annexed to the Interlocutor of the Sheriff, been imposed, and its amount, as ascertained by section 20 of the statute, may, as already said, be decerned for at any time upon a motion. It is, however, quite optional to the Local Authority to sue for the penalty or not, as they think fit; and as they have not done so, nothing remained to be done under the petition. We say, therefore, that the cause had been finally determined, and as such had reached the stage at which, in terms of section 3 of the Act of 1875, it is appealable. The Case of *Home v. The*

1883.

No. 42.

Lee

v.

Loc. Auth.  
of Lasswade.High Court,  
Nov. 2

Appeal.

1883. *Local Authority of Kelso*, High Court, Mar. 17, 1876  
 No. 42. Couper, vol. iii., p. 239, is in point. The objection that  
 Lee the case was not concluded was equally applicable to  
 v. that case; for penalties for the future were there imposed  
 Loc. Auth. and yet the competency never seems to have been  
 of Lasswade. doubted. This is also a 'cause' within the description  
 High Court, in section 2 of the Act of 1875. It is a proceeding  
 Nov. 2. which, although not brought, might have been brought  
 Appeal. under the Summary Procedure Act, and that is what  
 the expression 'may be brought' in that section means.  
 The case also falls within the description in subsection  
 1 of section 3 of the latter Act—the section which defines  
 the proceedings to which its enactments may be applied.  
 It is a proceeding in relation to the trial of what is by  
 the statute of 1867 called an offence [see section 20  
 footnote, p. 332], for which imprisonment can be awarded  
 upon summary complaint, and as such it falls also within  
 subsection 2 of section 3 of the Procedure Act. It is also  
 in terms of the description in section 28 of that Act, 'a  
 criminal proceeding,' being a case where 'in pursuance  
 of a judgment upon a summary complaint, the Court  
 authorized, in default of payment, or recovery of the  
 penalty or expenses, or in case of disobedience to the  
 order, to pronounce sentence of imprisonment for a  
 period limited,' [reads section 28 of 27 and 28 Vic.,  
 53, see footnote, p. 334]. And finally it falls within  
 the remaining definition of the word 'cause' contained  
 in the interpretation clause of the Act of 1875; being  
 'a summary proceeding for the prosecution of an offence  
 or recovery of a penalty competent to be taken before  
 an inferior Judge.'

LORD YOUNG.—The Public Health Act regards it as  
 an offence only when the decree or order of the Judge  
 is not complied with within the appointed time, and it  
 is only then, that in terms of the statute, a penalty can  
 be proceeded for.

J. CAMPBELL SMITH and RHIND, for the appellant.—  
 We contend that although a penalty is not prayed for

the Sheriff could, in terms of section 19 of the Act of 1867, have imposed one under the general conclusions of the prayer, as the section enacts that it shall not be necessary to restrict the decree to any special remedy prayed for. And, at all events, the proceeding is one which leads towards and involves a penalty. And as imprisonment is by section 105 authorised for recovery of the penalty, or any sum of money or expenses which may be decerned for, the decree of expenses which was here pronounced amounts, we contend, to a decerniture of a sum of money of the nature of a penalty. And in any view, even if the judgment be regarded as simply an order *ad factum præstandum*, the proceeding in which it was pronounced is a criminal proceeding in the sense of section 28 of the Summary Procedure Act [see footnote, p. 334], falling within the summary criminal jurisdiction of the Sheriff, in terms of the provisions of that Act, and as such the appeal is competent in terms of the provisions in sections 2 and 3 of the Appeals Act of 1875. *Binning Home v. The Local Authority for Kelso*, High Court, March 17, 1876, Couper, vol. iii., p. 239; *The Local Authority for Selkirk v. Brodie*, High Court, March 16, 1877, Couper, vol. iii., p. 400; *The United Kingdom Temperance and General Provident Institution v. The Local Authority for Cadder*, High Court, June 14, 1877, Couper, vol. iii., p. 447.

The DEAN OF FACULTY and SHAW, for the respondent, argued.—This is a proceeding under sections 18 and 19 of the Act of 1867 [see footnote, p. 332], not under section 20. The former do not contemplate the infliction of a penalty in the course of any procedure taken under them. The deliverance to be pronounced by the Sheriff or other Judge is called in these sections a decree, and is to be of the nature of ascertaining the existence of the nuisance and its author, and of pronouncing orders for its removal, or remedy, or discontinuance. And it is only where there has been disobedience to these orders

1883.

No. 42.

Lee

v.

Loc. Auth.  
of Lasswade.High Court,  
Nov. 2

Appeal.

1883. that the statute, in section 20, contemplates that a pena  
 No. 42. shall be inflicted. The section sets out—‘ If the s  
 Lee decree be not complied with ’ [reads, see footnote, p. 33  
 v. and it then goes on to provide penalties for what  
 Loc. Auth. of Lasswade. called offences. In terms of these sections these co  
 High Court, Nov. 2. not, we contend, be prosecuted for by a petition such  
 Appeal. the present one, but would require a separate compla  
 brought under section 20. The case does not fall wit  
 the description in the statutes of the causes which  
 appealable in the manner prescribed by the Act of 18  
 The proceedings are not criminal ; there is no offe  
 prosecuted for. The prayer of the petition is *ad f  
 tum præstandum*, and there is no sum of money  
 anything of the nature of a penalty concluded for, i  
 is there any decerned for, the only sum of mor  
 mentioned in the Interlocutor being the expenses, a  
 these are not of the nature of a penalty. The certifi  
 tion annexed to the Interlocutor does not amount to  
 decerniture for a penalty. It is a mere declaration  
 the law, and amounts only to saying that, in the ev  
 of the orders in the Interlocutor not being complied w  
 the defender will be proceeded against in terms of sect  
 20. It is only upon such failure being ascertained  
 the course of a separate petition that it can be said t  
 an offence has been committed, and that the proced  
 becomes one for the recovery of a penalty. But, :  
 ther, whether, in order to the infliction of a penalt  
 separate petition be necessary or not, the case is not  
 any view a concluded cause. No penalty has b  
 imposed ; and if it be contended that the responde  
 may yet proceed against the appellant, Mr Lee, for  
 penalty, the cause cannot be said to be concluded.  
 follows, therefore, that if this be a prosecution for per  
 ties it is not ended, and if it is not, and a separ  
 petition is required, it is not a cause which is appeal  
 in terms of the Act of 1875. But assuming even tha  
 penalty could be inflicted in the proceedings under  
 present petition, the Judge, when moved, might ref  
 to inflict the penalty, and no penalty is in point of f



yet decerned for. Therefore, in any view, the case is not concluded. It is also not a 'cause' in the sense of the definition in section 2 of the Act of 1875, in which an appeal may be taken. It is not, as already stated, a prosecution for an offence, and it is not a proceeding for the recovery of a penalty or sum of money of the nature of a penalty. It is not, therefore, even a proceeding which, although not brought, could have been brought under the Summary Procedure Act. The expression 'may be brought' in the interpretation clause of the Act of 1867 means, we contend — has been brought, and unless proceedings have, in point of fact, been brought under the Summary Procedure Act, they are not, we contend, causes which are appealable in terms of sections 2 and 3 of the Act of 1875. On these grounds, therefore, this appeal is, we contend, incompetent.

The LORD JUSTICE-GENERAL—This is a Case stated by the Sheriff-substitute of Midlothian under the authority of section 3 of the Act 38 and 39 Vic., cap. 62, commonly known as the Summary Prosecutions Appeals Act, 1875. The proceedings in the Sheriff Court were instituted under the Public Health Act, 1867, the complaint being in terms of section 18, and the Interlocutor or deliverance of the Sheriff-substitute, which it is sought to bring under the review of the Court, being in terms of section 19 of that statute. The complaint and Interlocutor seem to me to be both in the statutory form, and if we were dealing with the case as one entirely under the Act of 1867, there can be no doubt that the appeal would be incompetent. There is a right of appeal given in certain special cases by section 107 of that statute, but in all other cases appeal is declared to be incompetent by section 108, and as this petition does not fall within the category of those excepted cases it follows that the appeal, in so far as the provisions of the Act of 1867 are concerned, would be absolutely excluded.

But the appellant relies on the terms of section 3 of the Summary Prosecutions Appeals Act of 1875, and it

1883.

No. 42.

Lee  
v.Loc. Auth.  
of Lasswade.High Court,  
Nov. 2.

Appeal.

1883. therefore becomes necessary to ascertain precisely what  
is the class of cases to which the provisions of that  
section apply. The section provides that ‘On an inferior  
Judge hearing and determining any cause, either party  
to the cause may, if dissatisfied with the Judge’s deter-  
mination as erroneous in point of law, appeal there-  
against, notwithstanding any provision contained in the  
Act under which such cause shall have been brought ex-  
cluding appeals against or review in any manner of way of  
any determination, judgment, or conviction, or complaint  
under such Act,’ and so forth;—and the word ‘cause’ is  
defined in section 2 of the interpretation clause to mean  
and include ‘every proceeding which may be brought  
under the Summary Procedure Act, 1864, and every  
other summary proceeding for the prosecution of an  
offence or recovery of a penalty competent to be taken  
before an inferior Judge.’ So that whether this is a pro-  
ceeding falling within the description of ‘cause,’ to which  
the provisions of section 3 of the Act of 1875 apply,  
depends on whether it is a proceeding which ‘may be  
brought under the Summary Procedure Act, 1864,’ or is  
‘a summary proceeding for the prosecution of an offence,  
or the recovery of a penalty, competent to be taken  
before an inferior Judge.’ Now, it is clear that the  
Summary Procedure Act was intended to apply only to  
criminal prosecutions, or to prosecutions for the recovery  
of penalties. The title of the statute is, ‘An Act to  
make provision for uniformity of process in summary  
criminal prosecutions and prosecutions for penalties in  
inferior Courts in Scotland;’ and the third section specifies  
in four subsections the cases to which the provisions of the  
Act may be applied; and in these subsections it is clearly  
provided that the statute can apply to nothing except  
to a criminal prosecution, or to a prosecution for the  
recovery of a penalty. It is thus quite plain that the  
‘causes’ which are included within the provisions of the  
third section of the Act of 1875 are summary criminal  
proceedings and summary proceedings for the recovery

No. 42.  
Lee  
v.  
Loc. Auth.  
of Lasswade.  
High Court,  
Nov. 2.  
Appeal.

of penalties. It appears to me, therefore, that the only question remaining for determination is, Whether this is a criminal prosecution, or a proceeding for the recovery of a penalty? And that depends, in the first place, upon the prayer of the petition, and, secondly, upon the nature of the deliverance or sentence pronounced by the Judge.

1883.

No. 42.

Lee

v.

Loc. Auth.  
of Lasswade.High Court,  
Nov. 2.

Appeal.

The petition prays the Sheriff to ordain the defender to discontinue a nuisance, which it is said existed at a date mentioned, and still existed, and which is described in the Condescendence at considerable length, and to remedy the same in a manner which is specified, so as to render the property in question habitable and free from nuisance; and the prayer concludes,—‘And further, to grant interdict against the recurrence of any of the said nuisances, or to do further or otherwise as the case may in the judgment of the Court require; and further, to prohibit the using of the said premises for the purpose of a human habitation until the same be rendered fit for that purpose, or to do otherwise as the case may in the judgment of the Court require; and to find the defender liable in expenses.’—Now, the deliverance which the Sheriff pronounced in this application was to find that the nuisance existed within the meaning of section 16 at the date mentioned; that the same was caused by the defender’s failure to do certain things which are specified; that the nuisance was likely to recur; and upon these findings the defender is ordained to do certain things and execute certain works prior to a date specified; and then these words follow—‘Under certification that, if the said decree be not complied with within the time appointed, the defender shall be liable in the penalties enumerated in section 20 of the Act 30 and 31 Vic., c. 101: Finds the defender liable in expenses.’

Now, I think that but for those concluding words the appellant was hardly in a position to contend that this was either a criminal proceeding or a proceeding for recovery of a penalty. But he seems to contend that

1883. the proceedings may be converted into a prosecution for the recovery of a penalty before they come to an end and that leads me to consider the nature and effect of the provisions of section 20 of the Public Health Act. That section provides that 'If the said decree be not complied with in good and sufficient manner, and within the time appointed, the author of the nuisance, or the owner as the case may be, shall be liable,' in the case of the nuisance here in question 'to a penalty of not more than ten shillings per day during his failure so to comply.' Now, it appears to me that the penalties here provided are not really of the nature of proper penalties but are mere fines to be inflicted in the course of the proceedings for not complying with an order of Court so that the proceedings could at no stage be converted into proceedings for the recovery of a penalty. But even if they could, and if they might become, on failure to comply with the order of the Sheriff, 'proceedings for the recovery of a penalty,' it appears to me that the difficulty must be met,—that the cause in that view is not at an end. It cannot become a proceeding for the recovery of a penalty until failure to obey the order of the Sheriff, and until the penalty is moved for, and even then it is only after the penalty has been inflicted that an appeal could be taken against the determination of the Sheriff. I never before heard it suggested that there could be an appeal in terms of section 3 of the Summary Prosecutions Appeals Act in the middle of a cause; indeed, the words at the commencement of the section exclude any such suggestion. The section commences—'On an inferior Judge hearing and determining a cause, either party to the cause may, if dissatisfied with the appeal thereagainst—that is to say, upon an inferior Judge fully and finally disposing of the cause, appeal shall be competent in the manner prescribed. At the same time, in stating this additional objection, I should not like it to be supposed that I at all countenance the view that, on failure to comply with the order of the

No. 42.  
Lee  
v.  
Loc. Auth.  
of Lasswade.  
High Court,  
Nov. 2.  
Appeal.

inferior Judge, this proceeding might become a proceeding for the recovery of a penalty, and so be appealable at a later stage, or that it is to be regarded as anything else than a proceeding for the recovery of a fine—not a penalty.

I think we should refuse this appeal as incompetent.

The LORD JUSTICE-CLERK.—I have had great difficulty in this case on the question whether the proceedings are to be regarded as proceedings for the recovery of a penalty, and I do not wish to give any final opinion on that point, but I have no doubt that an appeal is incompetent at the present stage, as the cause cannot be regarded as determined by the Sheriff, and on that ground I agree with your Lordship. I must own, however, that I should be slow to say that if the Sheriff proceeds to exhaust the certification of his judgment that he would not thereby inflict a penalty within the meaning of the 3d section of the Summary Prosecutions Appeals Act, 1875, and so pronounce a judgment which might be appealed. I am content, however, to rest my opinion on the want of finality in the cause as it at present stands.

LORD YOUNG.—I concur in the judgment which your Lordship proposes, and in the grounds of it. I think that the Local Authority could not if they would, and need not if they could, recover a penalty in the course of the proceedings under this petition. I am further of opinion that, even if they could and would, they have not done so, and that alone is sufficient for the disposal of the Case; because we can entertain appeals only in cases which the inferior Judge has, in the language of the Act of 1875, ‘heard and determined;’ but I am quite clearly of opinion that a penalty could not be recovered in this case.

LORD MURE.—I agree with your Lordship that as no penalties are prayed for in this petition they could not be recovered in the proceedings under it, and that even if they could an appeal is incompetent, as they

1883.

No. 42.

Lee

v.

Loc. Auth.  
of LasswadeHigh Court,  
Nov. 2.

Appeal.

1883. have not been imposed by the Sheriff. But I wish to  
 No. 42. reserve my opinion on the question whether, if the  
 Lee Sheriff is petitioned to carry out the certification in his  
 v. Interlocutor, the proceedings might not then become a  
 Loc. Auth. proceeding for the recovery of a penalty, which, when  
 of Lasswade. the penalty is imposed, might be appealed.  
 High Court, Nov. 2.  
 Appeal.

LORD CRAIGHILL.—I also concur. I have some doubt whether or not this is, or may come to be, a prosecution for the recovery of a penalty; but even if at a future stage this proceeding may come to be a prosecution for a penalty, appeal is incompetent at this stage, in respect the case has not as yet been heard and determined finally.

LORD ADAM.—I concur with your Lordship in the chair.

The Court pronounced this Interlocutor :—

‘*Edinburgh, 2nd November 1883.*—Having heard counsel for the parties, and considered this Case: Dismiss the appeal as incompetent: Find the respondent entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the appellant.’

Agent for the Appellant—PARTY.

Agents for the Respondents—Messrs CURROR & COWPER, S.S.C.

---

Present,

The LORD JUSTICE-GENERAL.

The LORD JUSTICE-CLERK.

LORDS YOUNG, MURE, CRAIGHILL, and ADAM.

HER MAJESTY’S ADVOCATE—*Brand, A.-D., and Mackay, A.-D.*

AGAINST

JOHN HANNAH (Absent).

BAIL—TIME—FUGITATION—CERTIFICATION FROM CIRCUIT COURT—  
 FORFEITURE OF BAIL-BOND.—In a case which was certified from a Circuit Court to the High Court upon an objection to relevancy, and the panel, who was out on bail, failed to appear at the diet fixed for his appearance before the High Court.—Held that the Court could competently pronounce sentence of fugitation, and declare the bail-bond forfeited, and such sentence pronounced accordingly.

JOHN HANNAH, schoolmaster in the village and parish of Carsphairn, and stewartry of Kirkcudbright, was indicted and accused before the Circuit Court, held at Dumfries in September 1883, of the crime of 'using lewd, indecent, and libidinous practices and behaviour towards a girl under the age of puberty, especially when used by a schoolmaster towards a scholar entrusted to his care.'

1883.

No. 43.  
John  
Hannah.High Court,  
Nov. 2.Lewd and  
Libidinous  
Practices.

IN SO FAR AS (1) on several or one or more occasions between the 1st day of March 1877 and the 2d day of July 1878, the occasions or occasion being to the prosecutor more particularly unknown, within or near the schoolhouse or premises in or near Carsphairn village aforesaid, then occupied or used by you, you the said John Hannah did, wickedly and feloniously, use lewd, indecent, and libidinous practices and behaviour towards Agnes M'Millan, a girl then aged eleven years or thereby, or otherwise then under the age of puberty, daughter of, and then and now or lately residing with, Gilbert M'Millan, shepherd, at or near Woodhead, in the parish of Carsphairn aforesaid, and then entrusted by him to your care as a scholar, and then as such attending the school carried on by you as master thereof in the schoolhouse or premises aforesaid, by putting your hand up under her clothes, upon her naked person, and upon or near her private parts, and using towards her other such lewd, indecent, and libidinous practices and behaviour: Likeas (2), &c.

The indictment contained six other similar counts in which a latitude was taken in libelling the time of 12, 19, 2, 15, 7, and 8 months respectively, it being added in each 'the occasion or occasions being to the prosecutor more particularly unknown.'<sup>1</sup>

The Record of the case in the Circuit Court bears that

<sup>1</sup> See the Cases of *Forbes* in 1758, and of *Nairn* and *Ogilvie* in 1765, quoted by Hume, vol. ii., p. 223; *John Bell*, Dec. 1 and 2, 1777, quoted by Hume, vol. ii., p. 224; *Thomas* and *Mary Braid*, 27th January 1834, Bell's Notes to Hume, vol. ii., p. 217; *John* and *Mary Craw*, High Court, 8th Nov. 1839, Swint., vol. ii., p. 449; *William Carlyle*, High Court, 10th June 1839, Swint., vol. ii., p. 392; *James Simpson*, High Court, 13th June 1870, Couper, vol. i., p. 437; *Henry Creighton*, Inveraray, 3d May 1876, Couper, vol. iii., p. 254; and the Case of *Thomas Fraser*, 7th Nov 1873 (unreported), where, in an indictment charging embezzlement, the time libelled was 'between 7th March 1873 and 27th May 1875, the particular occasion or occasions being to the prosecutor more particularly unknown.'



1883. 'an objection having been by the Counsel for the panel  
 No. 43. stated to the relevancy of the indictment on the ground  
 John Hannah. that undue latitude of time is taken, or insufficient speci-  
 High Court, fication of the time when the offences charged are said  
 Nov. 2. to have been committed is given by the public prosecutor  
 Lewd and in the indictment. Lord Mure certified this case to the  
 Libidinous High Court of Justiciary to meet at Edinburgh upon  
 Practices. Monday, the 29th day of October 1883 : continued the  
 diet against the panel till that time, and of consent of the  
 Advocate-Depute, allowed the panel to leave the Bar, an  
 arrangement having been made for his appearance at  
 any proceedings under this libel within six months from  
 this date.' <sup>1</sup>

At the calling of the diet before the High Court on 29th October, the panel failed to appear, and the Advocate-Depute thereupon moved the Court to pronounce sentence of fugitation, and to declare the bail-bond of date 29th June 1883 forfeited, and stated that a letter, intimating that the present diet before the High Court was to be called, had been sent to the cautioner in the bond, and a similar one to the panel's last known address. A doubt having been expressed from the Bench as to the

---

<sup>1</sup> The bail-bond, which was dated 29th June 1883, bore that the cautioner bound and obliged himself, his heirs, &c., as cautioner 'for John Hannah, schoolmaster, Carsphairn, that he shall appear and answer, or that I shall present him, at all diets of Court in and until the final issue of any action, process, or criminal prosecution already brought, or which may at any time within six months from this date be brought against him, at the instance of a proper prosecutor, before a competent Court, for the alleged crime of,' &c., 'all as more fully set forth in a petition or complaint presented to the Sheriff of Dumfries and Galloway,' . . . 'and that under a penalty of £100 to be paid by me and my foresaids in case of failure; and I, the said John Hannah, accused, with consent and concurrence of me, the said cautioner, do hereby consent and declare that all citation or other intimation in reference to the said criminal charge, or to this bond, which may be left for me, the said accused, within the Sheriff-clerk's office in Kirkcudbright, shall be sufficiently and equally binding on me, the said accused, and on me, the said cautioner, as if delivered to me, the said accused, personally, which office I, the said accused, with consent and concurrence foresaid, do hereby cist as my domicile; and we consent to registration hereof,' &c.

competency of pronouncing sentence of outlawry and forfeiture of the bail-bond at a diet fixed for a hearing on the relevancy, the Court called for argument upon the point, and continued the diet till 2d November 1883.

1883.

No. 43.  
John  
Hannah.High Court,  
Nov. 2.Lewd and  
Libidinous  
Practices.

MACKAY, A.-D., contended.—The panel in his bail-bond undertook that he would appear at any future diet whether of the Circuit or of the High Court; and as the latter is the same Court as the Circuit Court, and can do all that could be done on circuit, and it is not doubtful that the Circuit Court could have fugitated the panel and declared his bail-bond forfeited if he had been indicted again before it, and had failed to appear, it follows that the same procedure is competent in like circumstances before the High Court. Lord Mure's Interlocutor certifying the case and continuing the diet was, apart from the letter of intimation to the panel and his cautioner, sufficient notice to them of the time and place of the present diet, which is the regular diet mentioned in the bail-bond. The Crown is therefore entitled to sentence of fugitation and to a declaration of forfeiture of the bail-bond. *William Smith*, Glasgow, 15th Sep. 1836, Swint., vol. i., p. 301; Hume, vol. ii., p. 26, also p. 271 (MS. note by Baron Hume on copy in Advocates' Library<sup>1</sup>); *Mary Ritchie or Alcock*, Perth, 23 April 1857, Irv., vol. ii., p. 615.

After taking the Case to avizandum, the Court, at the next diet, without delivering opinions, pronounced sentence of fugitation, and declared the bail-bond to be forfeited.<sup>2</sup>

<sup>1</sup> The note is with reference to the text in the first two lines of the last paragraph, at page 271 of Hume's second volume, and is as follows:—'But appearance must be made for the panel to prevent fugitation from passing. Even his cautioner cannot state the objection for him. The question as to forfeiture of the bail bond is different and remains for discussion. See Swinton's cases, No. 92. Fugitation refused in respect of an informality in the short copy of citation. Counsel compeared for him. When no appearance for him, no objection to the citation can be pleaded. Swinton, No. 69, p. 301.'

<sup>2</sup> The Records of the Court of Justiciary bear that at the Dumfries Spring Circuit, held upon 8th April 1842, before Lord Mackenzie,

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and ADAM.

WILLIAM BOLE and OTHERS, Suspenders—*J. C. Smith*

AGAINST

JAMES and JAMES CHARLES STEVENSON, Respondents—  
*Sol. Gen. (Asher), and R. V. Campbell.*

PERJURY—RELEVANCY, OBJECTION TO, AFTER TRIAL AND CONVICTION  
—EXPENSES—SUSPENSION.—A conviction and sentence upon a  
charge of perjury suspended (notwithstanding that no objection  
to the relevancy had been taken before the Sheriff) on the ground  
that what was charged did not amount to a crime in respect that  
what the accused were stated in the minor proposition to have  
falsely deposed to was not inconsistent with what was there  
alleged as the true state of the facts.

1883.

No. 44.  
Bole and  
Others  
v.

Stevensons.

High Court,  
Nov. 2.

Suspension.

WILLIAM BOLE, junior, DAVID MURRAY, and GEORGE  
WILKINSON were charged before the Sheriff Court of  
Roxburghshire upon a criminal libel, dated 4th October  
1883, at the instance of JAMES and JAMES C. STEVEN-

James Dalziel, designed 'now or lately master of the wherry or vessel  
*New Union of Dumfries*, residing at Maxwelltown,' was indicted for  
theft.

On an objection stated to the relevancy, Lord Mackenzie certified  
the Case to the High Court of Justiciary to meet at Edinburgh upon  
Monday the 30th day of May next [see Broun, vol. i., p. 217, foot-  
note, p. 219]; and committed the panel to prison. He must after-  
wards have been liberated on caution, but no entry to that effect  
appears on record.

On 30th May 1842, the diet was continued in a general continuation  
of diets by the Lord Justice-Clerk, till Monday 13th June next.

On 13th June 1842, before the Lord Justice-General (Boyle), Lord  
Justice-Clerk (Hope), and Lords Meadowbank, Mackenzie, Moncreiff,  
and Cockburn, the diet was called, and the said James Dalziel having  
failed to appear, the Court pronounced sentence of outlawry against  
him, and declared the bond of caution lodged for his appearance to be  
forfeited. See *James Dalziel*, Dumfries, April 8th, and High Court,  
Sep. 29, 1842, Broun, vol. i., pp. 217 and 425. [Note, The date in  
the footnote at p. 219 of Broun, vol. i., should be June 13, 1842,  
and not June 20, 1842.]

son, the Procurators-fiscal of the county, with the crime of perjury.

1883.

No. 44.  
Bole and  
Others.

v.  
Stevensons.

High Court,  
Nov. 2.

Suspension.

IN SO FAR AS Lucy Jane Wilkinson, a dressmaker, having on the 27th August 1883 lodged a charge of assault, committed upon her, against Robert Blaine, druggist, Hawick, and Blaine having been brought to trial (on a charge of assault and breach of the peace) on the 3rd day of September 1883, before George Blaikie and Alexander Sutherland Lawson, both magistrates of Hawick, and Bole, Murray, and Wilkinson having been adduced as witnesses for the panel, 'they did, all and each, or one or more of them, in presence of the said magistrates, and after having been then and there solemnly sworn by the said Alexander Sutherland Lawson to speak the truth, the whole truth, and nothing but the truth, then and there, wickedly and feloniously, and knowingly, wilfully, and falsely swear and depone to circumstances contrary to the truth, knowing the same to be so, in the following or similar terms, viz. :—That on the night of the 27th of August 1883, between nine and ten o'clock, they were attending a Blue Ribbon Army meeting in Hawick along with the said Robert Blaine, and were not in Buccleugh Street in Hawick that night at that hour, and that they did not upon that night see any assault committed by the said Robert Blaine upon the said Lucy Jane Wilkinson, nor hear any disturbance in Buccleugh Street that night committed by the said Robert Blaine, but on the 28th day of August 1883 they were in company with the said Robert Blaine when they met the said Lucy Jane Wilkinson and another girl there, and that the said Robert Blaine had a conversation with the said Lucy Jane Wilkinson, but that he did not strike her or swear at her: Whereas the truth is, and it will be proved, that the facts so sworn to by the said William Bole, junior, David Murray, and George Wilkinson as above libelled, or part thereof, were false, and were known by each of the said William Bole, junior, David Murray, and George Wilkinson at the time to be false: Inasmuch as the truth is, and it will be proved, that the said Robert Blaine did commit an assault upon the said Lucy Jane Wilkinson in Buccleugh Street in Hawick on the night of the 27th day of August 1883, by striking her with his fist upon or near her ribs, or on other parts of her person, and that he cursed and swore at her, and the said William Bole, junior, David Murray, and George Wilkinson having been apprehended,' &c.

No objection was taken to the relevancy at the first diet on 11th October, and at the second diet on 22nd October the accused were tried before the Sheriff-substitute (Russell) and a Jury, and were convicted, and each sentenced to three months' imprisonment.

1883.

They brought this Bill of Suspension.

No. 44.  
Bole and  
Others  
v.  
Stevensons.  
High Court,  
Nov. 2.  
Suspension.

J. C. SMITH argued for them.—There is here no relevant charge of perjury. What is set forth in the indictment as the true state of the facts is not inconsistent with the evidence which the panels are alleged to have given. According to the indictment, they deponed that they did not see an assault committed on the 27th August, and there is no statement in the indictment that they did see such an assault, which nevertheless might quite well have been committed.

R. V. CAMPBELL for the respondents.—This is not a debate upon the relevancy, but an objection taken after a verdict and a sentence following thereon. It is also an objection not to the major proposition but to the minor. The Court will therefore presume that there has been a fair trial, and that the substantial issue has been sent to the Jury, whose verdict must be held to have cured the defect. *Letters v. Black and Morrison*, High Court, 30th May 1848, Ark. p. 497; *Smith v. Lothian*, High Court, 21st March 1862, Irv., vol. iv., p. 170; *The Queen v. Goldsmith*, 31st May 1873, L. R., II. Crown Cases Res. p. 74, Alison, vol. i., p. 467.

LORD YOUNG.—I am very sorry to say that I think this objection must be sustained. I can hardly doubt—indeed it appears to me certain—that the Procurator-fiscal and the Sheriff-substitute thought that they had presented to the Jury a proper charge of a real offence. Nor is there much room for doubt that the Jury in convicting the panels convicted them of what, in the light of the evidence, was certainly a real offence; for the probability greatly is that these three lads, when examined as witnesses in exculpation, did say that they had not been present, and that they did not witness this assault committed—the fact being just the opposite—as the Prosecutor no doubt proved, though he does not aver it—that they were present, and that the assault was committed under their very eyes. If that was what was proved, of course a very clear case of perjury was

proved. But then we cannot hold that that was what was proved, for we cannot look beyond the indictment, and the indictment sets forth no such charge—indeed it sets forth no charge of perjury at all—and, therefore, I think that the verdict convicting the prisoners of the crime of perjury cannot stand. The rule of law is no doubt perfectly well settled, that many objections—such as objections to the citation—are cured by trial before a Jury and a verdict following thereon, and the same principle holds good in civil Courts; but this case does not come within the scope of that rule, for there is here really no crime charged at all.

1883.  


---

 No. 44.  
 Bole and  
 Others  
 v.  
 Stevensons.  


---

 High Court,  
 Nov. 2.  


---

 Suspension.

LORD ADAM.—I am of the same opinion. It seems to me that the prosecutor might have proved every word of his indictment without proving a case of perjury. There is not the least inconsistency between what is averred in the indictment to be the truth and what the complainers are stated to have sworn to.

LORD JUSTICE-CLERK.—I am entirely of the same opinion. I assume that the Jury convicted the panels of all that is stated in the indictment; but it is too clear for argument that that is wholly irrelevant unless the Jury also find that the panels saw this assault committed and swore that they did not see it. I entirely agree that the verdict of a Jury will often cure defects which might otherwise be fatal; but the verdict here is a conviction of what is charged in the indictment, and the indictment does not contain a relevant charge of perjury.

The complainers moved for expenses. The respondents opposed the motion.

LORD JUSTICE-CLERK.—This is an objection which should have been stated before the case went to trial. Had that been done, a new libel would have been served; and the case would not have come here. We therefore clearly think that no expenses should be allowed.

The following was the Interlocutor:—

*Edinburgh, 2nd November 1883.*—Having considered

1883.  
 No. 44.  
 Bole and  
 Others  
 v.  
 Stevensons.  
 High Court,  
 Nov. 2.  
 Suspension.

this Bill and heard counsel for the parties: Pass the Bill  
 Suspend the conviction and sentence complained of *simpliciter*: Ordain the complainers to be instantly set at  
 liberty: Find no expenses due, and decern.

Agent for the Suspender—W. GRAY, S.S.C.  
 Agent for the Respondents—CROWN AGENT.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

PATRICK DUFFY HUNTER, Suspender—*Nervay*.

AGAINST

WILLIAM MAWLAM, Respondent—*Lorimer*.

PAWNBROKER — EXCISE PROSECUTION — EXCHEQUER — JURISDICTION  
 SPECIFICATION — SUSPENSION — COMPETENCY — APPEAL — IMPRISON-  
 MENT—STATUTE 35 and 36 VIC., c. 93, SECS. 5, 6, 37, 52, and  
 (Pawnbrokers Act, 1872)—STATUTE 7 and 8 GEO. IV., c. 53, SECS.  
 79, 82, and 84 (Inland Revenue Act, 1823)—STATUTE 19 and 20  
 VIC., c. 56, SEC. 17 (constituting the Court of Session the Court  
 Exchequer)—SUMMARY PROCEDURE ACT, 1864, SECS. 4 and 25, and  
 SCHED. K—STATUTE 44 and 45 VIC., c. 33, SECS. 6 and 11 (Sum-  
 mary Jurisdiction (Scotland) Act, 1881)—STATUTE 38 and 39  
 VIC., c. 62, SECS. 2 and 3 (Summary Prosecution Appeals (Scot-  
 land) Act, 1875).—A person convicted upon a complaint brought  
 under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881  
 before two Justices sitting as a Court of Summary Jurisdiction,  
 terms of the Pawnbrokers Act, 1872, of having contravened  
 section 6 thereof, in so far as, time libelled, ‘he did in his shop  
 (a broker’s) ‘act as a pawnbroker within the meaning of said Act  
*particularly* section 6 thereof, by taking a watch and chain with  
 guinea attached in pawn,’ from a person named and designed  
 ‘without having in force a proper license from the Commissioner  
 of Inland Revenue,’ brought a Bill of Suspension before the High  
 Court on the ground that the complaint, being neither relevant nor  
 sufficiently specific, the conviction was inept, and was also further-  
 more bad in respect that under the Summary Procedure Act, 1864, and  
 the Pawnbrokers Act of 1872, it was competent only to award  
 immediate imprisonment, in place of imprisonment after fourteen  
 days, on failure to pay the penalty.

The respondent, the Public Prosecutor, objected to the competency  
 of the Bill on the ground that the case was a Revenue one, and the



only redress competent under the revenue statutes in such prosecutions was by way of appeal to the Quarter Sessions, and thereafter by appeal upon a Case stated for the opinion of the Court of Session as the Court of Exchequer.

**Held** that, as an offence punishable by penalty, or, failing payment, imprisonment, was sufficiently disclosed on the face of the complaint, it was not necessary to decide the question of competency raised, and the Bill of Suspension refused, with expenses.

THIS was a Bill of Suspension at the instance of **PATRICK DUFFY HUNTER**, described as a broker in Glasgow, of a conviction and sentence pronounced by two Justices of the Justice of Peace Court at Glasgow, sentencing to a penalty of Twenty pounds for a contravention of the Pawnbrokers Act, 1872 (35 and 36 Vic., c. 93), particularly the 6th section thereof, pronounced upon the following complaint :—

1883.

No. 45.  
Hunter  
v.  
Mawlam.High Court,  
Nov. 21.

Suspension.

*Under the 'Summary Jurisdiction (Scotland) Acts, 1864 and 1881.'*

**Unto** the Honourable Her Majesty's Justices of the Peace for the County of Lanark, the Complaint of William Mawlam, Officer of Inland Revenue, at 13 Queen Street, Glasgow, who prosecutes for Her said Majesty in this behalf (which Complaint is commenced and prosecuted by order of the Commissioners of Inland Revenue);

**Humbly Sheweth**—That Patrick Duffy Hunter, broker, Argyle Street, Glasgow, in the county of Lanark, has contravened The Pawnbrokers Act, 1872, in so far as on the 6th day of June in the year 1883, or about that time, in the shop then, and now or lately, occupied by him, and situated at Argyle Street aforesaid, he did act as a pawnbroker within the meaning of said Act, particularly the 6th section thereof, by taking a watch and chain, with guinea attached, in pawn from Felix Kleiser, watchmaker, Commercial Street of Hereford, in the county of Hereford, without having in force a proper license from the Commissioners of Inland Revenue authorising him to carry on the business of a pawnbroker; whereby the said Patrick Duffy Hunter is liable to forfeit an excise penalty not exceeding £50, as provided by the 37th section of the same Act.

May it therefore please your Honours to grant warrant to cite the said Patrick Duffy Hunter to appear before you to answer to this complaint, and thereafter to convict him of the aforesaid contravention, and to adjudge him to suffer the penalty provided by the said Act.

1883.

No. 45.  
Hunterv.  
Mawlam.High Court,  
Nov. 21.

Suspension.

The following was the conviction and sentence complained of:—

Glasgow, the 2nd day of August 1883, &c.—The Justices, in respect of the evidence adduced, convict the said Patrick Duffy Hunter of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £20 of modified penalty; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after a lapse of fourteen days from this date, and grant warrant to officers of court to apprehend the said Patrick Duffy Hunter, and to convey him to the prison of Glasgow, and to the keeper thereof to receive and detain him for the period of fourteen days from the date of his imprisonment, unless said penalty shall be sooner paid.

In the Bill it was pleaded, *inter alia*—There being no relevant and sufficient complaint against the complainer, the conviction following thereon is incompetent and inept. The conviction is also incompetent and inept, in respect of the incompetency of awarding imprisonment after a lapse of fourteen days, instead of immediate imprisonment, as required by the Act of 1864, and the Pawnbrokers Act, 1872, and the disconformity of the warrant to the statutory forms.

NEVAY for the suspender.—The complaint discloses no offence under the statute. It ought, in terms of the 6th section, to have set forth that the accused carried on the business of taking goods and chattels in pawn, and that he kept a shop for the purpose set forth in section 6. [Reads section 6<sup>1</sup> of 35 and 36 Vic., c. 93.]

---

<sup>1</sup> Statute 35 and 36 Vic., cap. 93, section 6 (The Pawnbrokers Act, 1872).—‘In order to prevent evasion of the provisions of this Act, the following persons shall be deemed to be the persons carrying on the business of taking goods and chattels in pawn,—that is to say, every person who keeps a shop for the purchase or sale of goods and chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives, or takes in goods or chattels, and pays or advances or lends thereon any sum of money not exceeding £10, with or under an agreement or understanding, expressed or implied, or to be from the nature and character of the dealing reasonably inferred, that those goods or chattels may be afterwards redeemed or repurchased on any terms, and every suc—

Secondly, The complaint ought also to have stated that a sum of money was advanced on the articles said to have been pledged—without which there could have been no pawning—and to have specified also the amount of said money; and, at all events, that the sum lent did not exceed £10, as required by the Act. Thirdly, No agreement to redeem the articles is libelled, so as to constitute pawning; and Fourthly, So far as appears on the face of the complaint, the accused is not a person who can, in terms of the Act, be deemed to fall under the 6th section. All the requirements of that section must be proved in order to establish the offence, and it was equally necessary to have libelled them. To say that he acted as a pawnbroker is not enough. An ordinary tradesman taking an article in pawn would not be guilty of a contravention of the statute, and so far as appeared on the face of the complaint, the accused is in no other position; and in any view, one single act of pawning does not constitute the accused a pawnbroker, or person who, in the words of the interpretation clause, ‘carries on the business of taking goods and chattels in pawn.’ *The Queen v. Beattie*, Court of Session, Dec. 18, 1866, v. Macph. 191. Further, by the conviction, execution by imprisonment after the lapse of fourteen days is substituted for poinding and sale, whereas under section 19 of the Summary Procedure Act, 1864, and section 56, subsection 4, of the Pawnbrokers Act, 1872, it is made competent, where poinding and sale is dispensed with, to grant warrant for

1883.

No. 45.  
Hunter  
v.  
Mawlam.High Court,  
Nov. 21.

Suspension.

---

transaction, article, payment, advance, and loan shall be deemed a pawning, pledge, and loan respectively within this Act.’

Section 37.—‘Every pawnbroker shall yearly take out from the Commissioners of Inland Revenue an excise license for carrying on his business. . . . If a person acts as pawnbroker without having in force a proper license, he shall, for every such offence, be liable to an excise penalty not exceeding £50. All the provisions contained in any Act relating to excise licenses, duties, or penalties, and in force at the commencement of this Act, shall, so far as the same are applicable, have full effect with respect to the license and duty and penalty aforesaid.’

1883.  
 No. 45.  
 Hunter  
 v.  
 Mawlam.  
 High Court,  
 Nov. 21.  
 Suspension.

immediate imprisonment only. Moreover, the conviction is not in the terms prescribed by schedule K, No. 3, of the Summary Procedure Act, 1864 (which is the form directed to be used by section 56, subsection 4, of the Pawnbrokers Act), nor in the terms of schedule B of the Summary Jurisdiction Act of 1881.

LORIMER for the respondent.—This is a Bill of Suspension of a conviction and sentence obtained before two Justices under sections 6 and 37 of the Pawnbrokers Act, 1872, an Inland Revenue statute. It is a prosecution for an ‘excise penalty,’ before a court of summary jurisdiction, in terms of that Act, and the Bill is incompetent. By the Inland Revenue Act of 1827 (7 ‘and 8’ Geo. IV., c. 53) there is an appeal provided by section 82 from the Justices to the Quarter Sessions in all revenue cases, which may, under section 84, state Case for the opinion of the Court of Exchequer; and by section 79 it is prohibited to remove such cases to the Court of Session or Court of Justiciary by Bill of Suspension, Advocation, or Reduction, or by any other proceeding, the prohibition, however, not extending to writs of *certiorari* issuing from the Court of Exchequer for removal of the case from an inferior court. And by section 17 of the Act constituting the Court of Session the Court of Exchequer (19 ‘and 20’ Vic., c. 56, 1856), it is provided that, in all Exchequer cases where the case might formerly have been removed from an inferior court by writs of *certiorari*, it shall be competent to bring them to the Court of Session sitting as the Court of Exchequer. [Reads section 17 of 19 ‘and 20’ Vic. c. 56.] So that, in terms of these enactments, review or stay of execution of the judgment of the Justices is competent only by the Quarter Sessions or Court of Session sitting as the Court of Exchequer. And similar procedure is also provided in section 52, subsection 1, *et seq.*, and section 56, subsection 7, of the Pawnbrokers Act, 1872. *Lazenby v. M’Arthur*, High Court, Nov. 9, 1874, Couper, vol. iii. p. 23; *Young v. Townshend*,

High Court, Nov. 24, 1856, Irv., vol. ii. p. 525; *Alexander v. Lindsay*, High Court, Nov. 13, 1867, Irv., vol. v. p. 491; *Brough v. Stewart*, Dec. 20, 1850, XIII. D. 408; *Evans v. M'Loughlan*, Feb. 21, 1861, XXIII. D. 1, and I. Paterson's Apps. 989 and IV. Macq. 89. It is true that the Pawnbrokers Act, 1872, enacts that the Summary Procedure Act may be applied to all proceedings taken under its provisions for the recovery of penalties before a court of summary jurisdiction, thus superseding so far the provision in section 25 of the Summary Procedure Act, 1864, excluding all revenue cases from its provisions, and giving room for the contention that, because the provisions of the Summary Procedure Act might be applied to proceedings taken under the Act of 1872, appeal was competent to this court in the form of a Case stated in terms of the provisions in sections 2 and 3 of the Summary Prosecutions Appeals Act, 1875. But such contention would not, we submit, have been well founded even prior to the passing of the Summary Jurisdiction (Scotland) Act, 1881 (44 'and 45' Vic., c. 33); and since that Act has been passed must be held to be altogether untenable. Where there are special provisions for review in the particular statute under which a prosecution is brought, the fact of the proceedings having been instituted under the Summary Procedure Act of 1864 has not the effect of superseding and rendering inoperative such special provisions. *Wright v. Dewar*, High Court, Nov. 27, 1873, and Mar. 9, 1874, Couper, vol. ii. p. 504. And further, section 11 of the statute of 1881, while enacting that the provisions of the Summary Jurisdiction Acts, 1864 and 1881, should apply to all summary proceedings under and by virtue of any of the revenue statutes, specially provides that 'prosecutions under the Revenue Acts shall continue to be subject to appeal to Quarter Sessions and to the Court of Exchequer in Scotland.' Although, therefore, the provisions of the Summary Jurisdiction Acts apply to revenue cases, that does not

1883.

---

 No. 45.  
 Hunter  
 v.  
 Mawlam.

---

 High Court,  
 Nov. 21.

---

 Suspension.

1883. supersede the special provisions in the revenue statutes  
 No. 45. for appeal to the Quarter Sessions and the Court of Ex-  
 Hunter chequer, or render the provisions in the Act of 1875  
 v. applicable, and the only competent review being that  
 Mawlam. provided by the revenue statutes, this Suspension is  
 High Court, incompetent.  
 Nov. 21.  
 Suspension.

But, assuming that the Bill is competent, the complaint is, we contend, perfectly relevant, and the Bill falls to be dismissed on that ground also. The offence is described in the statute—‘If a person acts as a pawnbroker without having in force a proper license, he shall, for every such offence, be liable to an excise penalty not exceeding Fifty pounds;’ and section 5 defines ‘pawnbroker’ as including ‘every person who carries on the business of taking goods and chattels in pawn;’ and section 6, a supplementary section, defines when a person shall be deemed to be following the business of taking goods and chattels in pawn. The complain- charges the acting as a pawnbroker within the meaning of the Act, particularly section 6 thereof, thus using the words of the statute in describing the offence, and that is sufficient. [See 27 and 28 Vic., c. 53, sec. 4.] It then sets forth a particular instance of the offence with sufficient specification, viz., by taking a ‘watch and chain with guinea attached, in pawn from’ a person designed ‘without having in force a proper license,’ &c.; and that is all that is necessary. *M’Mullan v. M’Phee*, High Court, June 9, 1882, Couper, vol. v. p. 1. That was a Case on appeal upon a case stated under the Act of 1875, and in which, therefore, the facts were before the Court. The question was as to the relevancy of the complaint, which charged the offence under the Glasgow Police Act, 1866, of carrying on the trade of a broker without having a license from the Magistrates. [See Statute 29 ‘and 30’ Vic., cap. CCLXXIII., secs. 172 and 184, footnote to *M’Mullan v. M’Phee*, *supra*, p. 3.] There the words of the statute were also used, viz., that the respondent ‘carried on the trade of a broker within

the meaning of the statute,' and the Court held that the complaint was relevant; although, having the facts of that case before them, they were, by a majority, of opinion that the particular instance of the offence there libelled did not show a carrying on of the trade of a broker, which it was thought was necessary to be proved in order to constitute the offence there libelled. But here there are no facts before the Court; and besides, one act is sufficient to constitute the offence here libelled. [See section 37, footnote, p. 357.] While, therefore, the first part of the judgment in the case of *M'Mullan v. M'Phee* is an authority for the relevancy of this complaint, the second part of that judgment does not apply.

Lastly, with reference to the conviction and sentence, it is in conformity with the forms in schedule K, annexed to the Summary Procedure Act, and it is competent to allow time within which to pay the penalty. These forms are not imperative, but are directory, and when used a precise adherence to the words of them is not essential; they may be changed to suit the circumstances of each case. *Kinnear v. Whyte*, High Court, May 25, 1868, Couper, vol. i. p. 56; *Scott v. Cumming*, High Court, July 7, 1866, Irv., vol. v. p. 278. Although there might have been some ground for the objection prior to the passing of the Summary Jurisdiction (Scotland) Act, 1881, that Act, by section 6 [reads], allowed time to be granted for making payment of penalties in all proceedings taken under the Summary Jurisdiction Acts. *Leishman v. Colquhoun*, High Court, July 13, 1877, Couper, vol. iii. p. 482; *Murray v. Jones*, High Court, June 17, 1872, Couper, vol. ii. p. 284. The objection is, therefore, now no longer maintainable. On these grounds the Bill ought, we submit, to be dismissed.

**LORD YOUNG.**—The objection to this conviction and sentence of imprisonment is that the complaint does not relevantly set forth any facts warranting the conviction, supposing them to be true, or does not set forth the

1883.

---

 No. 45.  
 Hunter  
 v.  
 Mawlam.

---

 High Court,  
 Nov. 21.

---

 Suspension.



1883.

No. 45.

Hunter

v.

Mawlam.

High Court,  
Nov. 21.

Suspension.

facts with sufficient specification to enable the party, they are not true, to defend himself against the charge.

My own opinion is that the complaint is unobjectionable in any of the respects referred to in the argument. The statute imposes a penalty upon any person 'who acts as a pawnbroker without having in force a proper license,' and the penalty is imposed in respect of every offence of so acting. Now, the complaint here states and quite distinctly, that the party complained of, at certain time specified, acted as a pawnbroker without having in force a proper license, and the individual offence of acting as a pawnbroker without having proper license is also stated—'By taking a watch and chain, with guinea attached, in pawn' from a certain person, who is described. I remain of the opinion which I expressed, and which was given effect to, in a case to a certain extent analogous, that one act will not constitute carrying on business as a broker, and I also think though that is not so clear, that one act will not constitute the offence of acting as a pawnbroker. The penalty is not for 'carrying on the business of a pawnbroker' but for 'acting as a pawnbroker,' and it is for every offence of acting as a pawnbroker that the penalty is awarded; but I am disposed to think that this act must be in the course of carrying on business as a pawnbroker although I do not think it necessary to decide that; for it is stated that he did act as a pawnbroker, and that acting as a pawnbroker, he received from a particular individual a watch in pawn. Now, I think that that is a relevant charge, on the principle of the case I have referred to, and that being so, the conviction on that charge—there are no alternatives in it at all—is a good conviction, so that, assuming our jurisdiction to entertain the question, I think the suspension is bad and if we have no jurisdiction we must refuse to set aside the suspension upon that ground, and so the result would be the same anyhow.

But I should like to say, without prejudice to any

opinion which I might form upon another argument, and in a case where it was necessary to decide the question, that I should have thought it quite within the power and according to the right of the party convicted, if he thought that the Justices in convicting him proceeded upon an erroneous view of the law as applicable to the facts, viz., that looking to the nature of his shop and the character of his business, he was not acting as a pawnbroker within the meaning of clause 6—I say I should have thought it according to his right to apply to the convicting magistrate to state a Case to this Court, for the prosecution is under the Summary Procedure Act of 1864, and is for the recovery of a penalty—not a sum of the nature of a penalty—but a penalty by name; and in order to enable such questions to be raised summarily, expeditiously, and inexpensively in this Court, an Act was passed in 1875 which provides that on an inferior Court hearing and determining any cause, either party, if dissatisfied with the Judge's determination, as erroneous in point of law, may appeal thereagainst upon a Case stated. That provision refers us to the definition, about which we had a good deal of argument in a case recently before us, by which 'cause' is defined to mean and include 'every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or the recovery of a penalty competent to be taken before an inferior Judge.' Now, this case not only may be brought under that Act, but has been brought under that Act, and therefore if any person is dissatisfied with a conviction or acquittal upon the ground of an error, as he supposes, in point of law, in the mind of the Judge, as applicable to the facts, it is specially provided that the question may be raised and tried and decided in this summary and expeditious form. The accused does not seek to take advantage of that form of redress, for he has brought a suspension; but if it had appeared on the face of the complaint that no offence had been

1883.

---

No. 45.  
Hunter  
v.  
Mawlam.

---

High Court,  
Nov. 21.

---

Suspension.

---

1883.

No. 45.  
Hunter  
v.  
Mawlam.

High Court,  
Nov. 21.

Suspension.

relevantly stated at all, so that the accused might have been convicted of what was in truth no offence, then I should have been of opinion, on the ground stated by Lord Craighill in the course of the argument, which we have frequently acted on, that this Court would have had jurisdiction to terminate the imprisonment which followed on such a conviction. But that question does not arise here, for I am of opinion that an offence punishable by penalty, or failing payment, by imprisonment, is disclosed upon the face of the complaint, and therefore upon the face of the conviction, and I propose to your Lordships, upon that ground, to dismiss this suspension.

LORD CRAIGHILL.—I am also of opinion that this suspension ought to be dismissed, but I do not think it necessary to go into the question of competency, for I think it is quite clear that we have here a relevant complaint.

LORD ADAM.—As to the merits of the suspension, I entirely concur with your Lordships, and have nothing to add. In regard to the competency of the suspension, before expressing my opinion, I should have wished to have had an opportunity of looking at the various clauses in the Acts founded on. Not having had such an opportunity, I do not give an opinion upon that point; but being, with your Lordships, clearly of opinion that there is no case on the merits, it is not necessary that I should do so.

The following was the Interlocutor :—

*Edinburgh, 21st November 1883.*—Having considered this Bill and heard counsel for the parties: Refuse the Bill, and decern: Find the respondent entitled to expenses, which modify to Five guineas, for which, and one guinea as the dues of extract, decern against the complainer.

Agents for the Suspender—LIDDLE & LAWSON, S.S.C.

Agent for the Respondent—SOLICITOR OF INLAND REVENUE.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

ROBERT GALLIE AND OTHERS, Suspenders—*M'Kechnie*.

AGAINST

ARCHIBALD BARCLAY FERGUSON, Respondent—*Kennedy*.

**CONVICTION—CLERICAL ERROR—FINE, AMOUNT OF—SUMMARY PROCEDURE (SCOTLAND) ACT, 1864, SEC. 34.**—The record of a conviction in a Police Court bore that certain of the accused were 'to forfeit and pay the sum of twenty shillings each of penalty,' and that the others were 'to forfeit and pay the sum of fifteen each (*sic*) of penalty.' Fines of twenty and fifteen shillings respectively were paid.—In a suspension *held* that the omission of the word 'shillings' in the second case did not vitiate the conviction.

ON 9th October 1883, ROBERT GALLIE and five other persons were charged in the Police Court of Stewarton, at the instance of ARCHIBALD BARCLAY FERGUSON, Procurator-fiscal, with the crime of breach of the peace. They pleaded not guilty, but the Magistrates, 'in respect of the evidence adduced, find the said Robert Gallie, John Brown, David Dickie, Frank Angus, George Brown, and Thomas Maltman guilty of the crime charged, and therefore adjudge the said Robert Gallie and John Brown to forfeit and pay the sum of twenty shillings each of penalty, and in default of immediate payment thereof, adjudge each of the said Robert Gallie and John Brown to be imprisoned in the prison of Ayr for the period of ten days; and the said David Dickie, Frank Angus, George Brown, and Thomas Maltman, and therefore adjudge each of them to forfeit and pay the sum of fifteen each [*sic*] of penalty, and in default of immediate payment thereof, adjudge each of the said David Dickie, Frank Angus, George Brown, and Thomas Maltman to be imprisoned in the prison of Ayr for the period of seven days from the date of their imprisonment, unless the said sum shall be sooner paid, and grant warrant,'

1883.

No. 46.  
Gallie and  
Others  
v.  
Ferguson.

High Court,  
Nov. 21.

Suspension.

1883. The accused brought a suspension, and pleaded  
 No. 46. the sentence was not so expressed as to be intelligible  
 Gallie and capable of being carried into effect. 'The complainants  
 Others each paid a sum of money, under protest, in order to  
 v. avoid imprisonment, but they do not know, and the  
 Ferguson. sentence does not say, what the fine amounts to in  
 High Court, sterling money.' *M'Lure v. Douglas*, High Court,  
 Nov. 21. Jan. 1872, Couper, vol. ii. p. 177; *Clarkson v. M'Lure*,  
 Suspension. High Court, 19th July 1871, Couper, vol. ii. p. 177.  
 Statute 27 and 28 Vic., c. 53, sec. 34 (Summary  
 Procedure (Scotland) Act, 1864).

LORD YOUNG.—The blunder with respect to three or four of the prisoners is that the word 'shillings' was omitted from the record of their sentence. But we know that in the ordinary course of business the fine was announced by the Magistrate, and it must have been paid here, for the fine was paid. It is said it was paid under protest. That may be, but it could not have been a protest that the prisoners did not know the amount of the fine, but a general protest of innocence. This suspension, therefore, must be refused. That is the opinion of the Court—we all think so.

The following was the Interlocutor:—

*Edinburgh, 21st November, 1883.*—Having considered this Bill, and heard counsel for the parties, the Court Refuse the Bill, and decern.

Agent for the Suspenders—THOMAS CARMICHAEL, S.S.C.  
 Agent for the Respondent—ALEX. MATHESON, W.S.

---

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

WILLIAM REANEY, Suspender—*Kennedy*

AGAINST

WILLIAM COMBE WALLACE MADDEVER, Respondent—*Dickson*.

SHIP—SEAMAN—WILFUL DISOBEDIENCE—STATUTE 17TH AND 18TH VIC., c. 104, SECTION 243, SUBSEC. 4 (Merchant Shipping Act, 1854)—STATUTE 25TH AND 26TH VIC., c. 63 (Merchant Shipping Act, 1862)—GENERAL CONVICTION UPON ALTERNATIVE CHARGE.—A seaman charged under the Merchant Shipping Act, 1854, section 243, subsection 4, with wilful disobedience to the lawful commands of the master or the chief engineer of the yacht in which he was employed, was convicted 'of the wilful disobedience charged.'—The conviction suspended as being a general conviction following upon an alternative charge, and in respect it was not distinctly stated either in the complaint or conviction what the orders were which the suspender was said to have disobeyed, and who gave them.

THIS was a Bill of Suspension at the instance of WILLIAM REANEY, lately stoker on board the yacht *Amy*, the property of William Bannatyne Stewart, of a conviction and sentence obtained before two Justices of the Peace at Rothesay upon a complaint at the instance of W. C. W. MADDEVER, the Procurator-fiscal, which charged a contravention of section 243, subsection 4, of The Merchant Shipping Act, 1854, in so far as he, the said William Reaney, did, while on a cruise on board the said yacht, wilfully disobey the lawful commands of John Cameron, master of said yacht, or of William Gillespie, chief engineer thereof, two of the superior officers of said yacht, on a day specified, the act of disobedience being stated to be by refusing to assist in keeping up the engine fires on board of said yacht. The Justices, on 26th October 1883, found Reaney 'guilty of the wilful disobedience charged,' and adjudged him to be imprisoned for three weeks.

KENNEDY for the suspender.—The Merchant Shipping

1883.

No. 47.  
Reaney  
v.

Maddever.

High Court,  
Nov. 22.

Susp. &amp; Lib.

1883. Act, 1854, does not apply to yachts. See section 10 of the Act of 1854.

No. 47.  
Reaney  
v.

Maddever.

High Court,  
Nov. 22.

Susp. & Lib.

DICKSON for the respondent.—That section is repealed by section 13 of The Merchant Shipping (Amendment) Act of 1862, 25 and 26 Vic., c. 63.

KENNEDY for the suspender.—The conviction is also general. It finds the suspender guilty of the wilful disobedience charged; but the charge is alternative, that he disobeyed John Cameron, the master, or William Gillespie, the chief engineer. The conviction is therefore void from uncertainty.

DICKSON for the respondent.—There is no substance in the objection. It is not a matter of any moment which of the two persons named gave the order which was disobeyed: they were both in a position of authority and the offence was committed if the lawful command of either was disobeyed.<sup>1</sup>

LORD YOUNG.—But there were two Justices, and we do not know that they were unanimous.

DICKSON for the respondent.—But the judgment one was sufficient.

LORD YOUNG.—The only ground of suspension argued to us,—for another point originally taken by the suspender's counsel was very properly abandoned,—the only objection, I say, is this, that the suspender being prosecuted under the Merchant Shipping Act for wilful disobedience to lawful orders, was not informed in the complaint who gave the order that was alleged to have been disobeyed. In the complaint he was told that an order was given on a particular occasion either by John Cameron, the master of the yacht, or William

---

<sup>1</sup> Statute 17th and 18th Vic., c. 104 (Merchant Shipping Act 1854), section 243.—‘Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offences, he shall be liable to be punished summarily, as follows.’ (4) ‘Act of disobedience.—For wilful disobedience to any lawful command, he shall be liable to be imprisoned for any period not exceeding four weeks, with or without hard labour.’



Gillespie, the chief engineer, and that the order was to keep up the fires on board the yacht. It appears from the statement in the Bill of Suspension that while the owner was on shore, and had left the yacht for a considerable time, the crew did not get on very well together, and this fireman got into loggerheads with the captain and the engineer. He says frankly that he was not in an obedient frame of mind, and refused to obey any orders. They resolved to punish him, and so took the yacht to Bute, and he was tried and sentenced to three weeks' imprisonment for wilful disobedience to a lawful command. In my own opinion, a prosecution of this kind, which is of a severe character,—although as the Legislature has sanctioned it, I am bound to assume of a necessary character,—should be conducted with some strictness; and a seaman in a private yacht sought to be imprisoned for wilful disobedience to lawful command, ought to be distinctly informed what the order was and who gave it. Being disposed, then, to look with some strictness on the prosecution, and finding, as I do find, that the prosecutor is unable to state whose order it was that was disobeyed, or being able to do so, does not state it; and again, that the Magistrates, in convicting the prisoner, were not able to concur in saying that one or the other of these persons gave the order, I think that there was a defect in the prosecution of which I am inclined to give the suspender the benefit. I am therefore of opinion that the conviction falls to be set aside.

LORD CRAIGHILL and LORD ADAM concurred.

The following was the Interlocutor:—

'*Edinburgh, 22nd November 1883.*—Having considered this Case, and heard counsel for the parties, Pass the Bill: Suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to five

1883.

No. 47.  
Reaneyv.  
Maddever.High Court,  
Nov. 22.

Susp. &amp; Lib.

1883. guineas, for which, and one guinea as the dues of extract, decern against the respondent.'

No. 47.  
Reaney

v.  
Maddever.

High Court,  
Nov. 22.

Susp. & Lib.

Agent for the Suspender—JOHN MACPHERSON, W.S.  
Agents for the Respondent—Messrs SMITH & MASON, S.S.C.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

THOMAS WYNN and MARK OWENS, Suspenders—*The Dean of Faculty (Macdonald) and Rhind.*

AGAINST

ALEXANDER LINDSAY, Respondent—*Solicitor-General (Asher), Q.C., and Mackay.*

PROCEDURE—WITNESS—EXAMINATION OF WITNESS NOT ON LISTS.—

During a criminal trial in a Sheriff Court, before a Jury, after proof on both sides was declared closed, a person whose name was not on either list of witnesses was examined on oath *in causa* at the request of the Court and the Jury, without any objection being taken by the prisoners, who were convicted.

Held that the examination of such witness was incompetent, and the conviction suspended.

1883.

No. 48.  
Wynn and  
Another  
v.  
Lindsay.

High Court,  
Nov. 22.

Susp. & Lib.

THOMAS WYNN and MARK OWENS were charged before the Sheriff Court at Airdrie (L. Mair, Advocate Sheriff-Substitute), at the instance of the Procurator-fiscal, ALEXANDER LINDSAY, with assault, especially when committed to the fracture of bones, serious injury of the person, and danger of life. Both panels pleaded not guilty, and after a trial before a Jury, both were found guilty, and sentenced to two years' imprisonment. They thereupon presented a Bill of Suspension, and stated that after the respondent had declared his proof closed, and after the proof for the suspenders in exculpation had also been closed, but before the addresses of the parties or the charge to the Jury, the Sheriff-Substitute called, *ex proprio motu*, and put into the witness box a policeman named M'Kay, who was present at the assault. The

cord bears that, 'at the request of the Court and of Jury, the following witness was examined on oath, Peter MacKay, inspector of police, Airdrie.' M'Kay is neither included in the list of witnesses for the prosecution nor in either of the lists of witnesses adduced in exculpation. No notice of his being about to be examined was given to either of the complainers, and his evidence was taken without any consent on their part.

It was pleaded in the Bill the sentence should be suspended and liberation granted, in respect that it proceeded on evidence given contrary to the law and practice of Scotland, by a person called as a witness neither by the prosecution nor the defence, and whose name was neither in the prosecutor's nor the panels' list of witnesses.

REHIND for the suspenders.—This conviction and sentence falls to be recalled. The Sheriff-Substitute acted incompetently in examining M'Kay *in causa* after proof was closed on both sides, his name not being on the lists of witnesses to be examined either for or against the panels.

The SOLICITOR-GENERAL and MACKAY for the respondent.—The Sheriff-Substitute acted within his right in this matter. It would tend to defeat the ends of justice if the discretion of the Court in an emergency were to be closed from calling a witness whose name was not on the lists. In the case of *George Lillie Smith*, High Court, Jan. 15, 1855, Irv., vol. ii., p. 1, it was held competent for the Court to order a witness to be examined by the counsel for one of the panels, although the name of the witness was not included in the list of witnesses for the prosecution, or in that given in by the accused. *fortiori* this applied in the present case. There is no distinction in this matter between the rules applicable to witnesses to be called for the prosecution and witnesses to be called in exculpation (Act 1672, c. 16, concerning the Justice Court, section 11). The Act of Adjournment, 18th March 1827, extended this to the Sheriff Court.

1883.  
No. 48.  
Wynn and  
Another  
v.  
Lindsay.  
High Court,  
Nov. 22.  
Susp. & Lib.

1883. And, in point of fact, the panels consented to M'Kay's examination; they did not object, and must be held to have consented.

No. 48.  
Wynn and  
Another

v.  
Lindsay.

High Court,  
Nov. 22.

Susp. & Lib.

LORD YOUNG.—As I stated more than once during the course of the argument, I do not think that this case is even arguable; and after I had looked at the Record I was prepared to hear an explanation to the effect that the witness had not really been called *in causa* at all, but merely to give an explanation of some incidental matter connected with the case: and the fact that he was examined on oath, probably unnecessarily, would not, I should have thought, have been sufficient to overturn the whole proceedings—at least the point is a very arguable one. But of all fixed rules in our criminal practice there is none better fixed than the rule that no witness shall be examined against the prisoner whose name is not on the list of witnesses served upon him with the indictment. If I had been asked to give an instance of a rule well fixed and of absolute application, I could not have given one which possessed these characteristics more strongly. It stands on statute, and has been followed in practice without a single departure recorded anywhere, so far as I know, down to the present day: and we know, or at least we have heard, of cases in which the rule has been thought to operate unfortunately, evidence having transpired against the prisoner quite conclusive after the case was in the hands of the Jury, but of which the Prosecutor could not avail himself in any way. Our law does not give the prisoner any information before the trial regarding the evidence on which he has been committed. It is otherwise in England; witnesses are there examined in his presence, and if any new evidence comes up afterwards copies of the depositions are given to him. As I have said, our system is otherwise, and our substitute is (and a very imperfect one it may be) that he shall have furnished to him the names and designations of all the witnesses who may be examined, fifteen days before trial; and that rule has, I

repeat, never been departed from. Here it appears on the record of the proceedings, and is the ground of complaint against the conviction, that after the evidence on both sides had been concluded—*after* the case for the prisoner had been entered upon and his proof closed, the Court and the Jury requested the Prosecutor to call and examine another witness not on the list. It has been ruled over and over again in more or less remote times—for there has never been any question upon the point in more recent times—that a Prosecutor cannot call a witness after his case has been closed. But to call a witness whose name is not on the list, or mend the case in any way, after the case for the prisoner is entered on, and his proof also closed, is one of the most extravagant and irregular proceedings I ever heard of. If one witness might be called, then any number might be, and the whole case might be altered. I do not know what the result might have been if there had been evidence to shew that the prisoner had given his consent. I should have thought, *prima facie*, that the rule subsisting in the High Court of Justiciary, that nothing can be done of consent against the prisoner, would apply. The apparent exception to that rule, that, according to long established usage, the admission by the prisoner, that his declaration was ‘freely and voluntarily emitted by him,’ is held sufficient to admit of the declaration being read, is in reality no exception. It is the declaration in that case that is the evidence, and not the admission. Nor is the fact that the witness was even cross-examined by the prisoner any evidence of consent. That might be done, and at the same time the prisoner might be making a most vehement protest by his counsel or agent against the competency of the evidence. He is not taking a double chance in any bad sense. He is entitled to minimise the effect of the evidence, if the High Court should be of the same opinion as the Sheriff as to its competency. He is not giving his consent in any way. He may think the evidence is erroneously admitted, but

1883.

No. 48.  
Wynn and  
Another  
v.  
Lindsay.

High Court,  
Nov. 22.

Susp. & Lib.

1883. it is not for him to proceed on the assumption that the Sheriff is wrong. But there are here no facts to raise any of these specialities, and on the general question I entertain no manner of doubt.

No. 48.  
Wynn and  
Another  
v.  
Lindsay.  
High Court,  
Nov. 22.  
Susp. & Lib.

LORD CRAIGHILL and LORD ADAM concurred.

The Court pronounced this Interlocutor:—

‘*Edinburgh, 22nd November 1883.*—Having considered this Bill, and heard counsel for the parties: Pass the Bill: Suspend the conviction and sentence complained of *simpliciter*: Ordain the complainers to be instantly set at liberty, and decern.’

Agent for the Suspenders—WM. OFFICER, S.S.C.  
Agent for the Respondent—CROWN AGENT.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

MARY GRUBB or RITCHIE, Appellant—*J. Campbell Smith.*

AGAINST

JAMES BROWN, Respondent—*A. J. Young.*

SENTENCE, SEPARATION OF PARTS OF—IMPRISONMENT IMMEDIATE IN DEFAULT OF PAYMENT OF PENALTY—PUBLIC HOUSE—STATUTE 9 GEO. IV., c. 58, SEC. 21 (Home-Drummond Act).—A publican convicted, under the Public Houses Acts, of a second offence in breach of the terms of her certificate, was sentenced to pay a penalty, and in default of *immediate* payment to imprisonment for thirty days. She paid the penalty, and appealed.

Held (following *Rhodes v. Ross*, High Court, Sept. 23, 1870, Couper, vol. i. p. 469) that the conviction and sentence was bad, as section 21 of the Home-Drummond Act allowed a person convicted of a second offence fourteen days for payment of the penalty, and the part of the sentence inflicting imprisonment was incapable of being separated from that which imposes the penalty.

1884.

No. 49.  
Ritchie  
v.  
Brown.  
High Court,  
Feb. 22.  
Appeal.

THIS was an Appeal under the Summary Prosecutions Appeals Act, at the instance of MARY GRUBB or RITCHIE, grocer and spirit dealer in Pittenweem, against a conviction and sentence pronounced in the Burgh Court

there, at the instance of the respondent, JAMES BROWN, the Procurator-Fiscal, convicting her of having been 'guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as' she 'did, between the hours of twelve o'clock of the night of Saturday the 27th and one o'clock of the morning of Sunday the 28th days of October 1883, or about that time, traffick in or give out from her licensed premises in James Street, Pittenweem, aforesaid, a quantity or quantities of spirits, being whisky, or other excisable liquors, to' (two persons designed), 'or to one or other of them, and such offence is the second offence.'

1884.

---

No. 49.  
Ritchie  
v.  
Brown.

---

High Court,  
Feb. 22.

---

Appeal.

---

The appellant pleaded not guilty after an objection to the relevancy had been repelled, and upon evidence being led in support of the charge and in exculpation, the following conviction and sentence was pronounced—

'The Magistrates, in respect of the evidence adduced, convict the said Mary Grubb or Ritchie of the offence charged, being a second offence, and adjudge her to forfeit and pay to the complainer the sum of two pounds ten shillings of penalty, and in default of *immediate* payment thereof, adjudge her to be committed to the prison at Cupar for the period of thirty days from the date of her incarceration, unless said sum shall be sooner paid, and grant warrant to officers of Court to apprehend her and convey her to said prison, and to the keeper thereof to detain her accordingly.'

The questions of law for the opinion of the High Court were—

'Whether the charge as laid is relevant?'

'Whether the facts proved are sufficient to warrant the conviction appealed against?'

J. CAMPBELL SMITH, for the appellant, objected, *inter alia*.—The offence charged is that the appellant did '*traffick in or give out*' from her licensed premises in Pittenweem, on the Sunday morning in question, to the individuals mentioned, excisable liquors. The terms of the prohibition in the appellant's certificate, under the Public House Acts Amendment (Scotland) Act, 1862, and which is said to have been contravened, is that she shall not *sell or give out* any liquors on Sunday. We



1884.

No. 49.  
Ritchie

v.

Brown.

High Court,  
Feb. 22.

Appeal.

complain that the charge is alternative and the conviction general, and therefore irrelevant.

LORD YOUNG.—This objection has now become matter of so frequent observation in this Court that seems astonishing that public prosecutors do not take the hint. If they would just change all the *ors* statutes into *ands* in libelling the offences under them it would save a deal of trouble.

J. CAMPBELL SMITH, for the appellant.—There is also this further objection—the sentence adjudges the appellant to pay a penalty of two pounds ten shillings, and in default of *immediate* payment thereof adjudges imprisonment for thirty days, whereas the statute, 9 G IV., c. 58, The Home-Drummond Act, by section authorises only for a second offence—‘And in case such ‘penalty and expenses’ (viz., the penalty and expenses following upon a conviction for breach of certificate ‘shall not be paid within the space of fourteen days next after such second conviction shall have taken place then the offender shall suffer imprisonment upon his own charges and expenses for a period of two calendar months in the common gaol or house of correction unless he or she shall sooner pay such second penalty and the expenses of conviction and of executing the same.’ It was therefore *ultra vires* of the Magistrates to award immediate imprisonment on failure to pay the penalty. *Rhodes v. Ross*, Stirling, Sept. 23, 1871; Couper, vol. i. p. 469; *M'Donald v. Dobbie*, Jan. 1 1864, II. Macph. p. 407.

A. J. YOUNG.—The point last stated is not included in the questions put in the Case as stated.

J. CAMPBELL SMITH, for the appellant.—It is covered by the question put, ‘Whether the facts proved are sufficient to warrant the conviction appealed against?’

A. J. YOUNG, for the respondent.—Assuming that the objection is included in the Case, I concede that the appellant was entitled to fourteen days within which to pay the penalty. But she has suffered no hardship.

She paid the penalty at once, and but for the fact that my learned friend, Mr Smith, was engaged in the case of *Rhodes v. Ross*, we probably never would have heard of this objection. It cannot be pleaded that she was concussed into immediate payment on account of the sentence of imprisonment which followed the award of the penalty. The latter was paid before the sentence was written out.

1884.

No. 49.  
Ritchiev.  
Brown.High Court,  
Feb. 22.

Appeal.

J. CAMPBELL SMITH, for the appellant.—I cannot admit that.

A. J. YOUNG, for the respondent.—I contend that the illegal part of the sentence is separable from the legal part.

LORD YOUNG.—It is to be regretted that this conviction, which is substantially a good conviction, should fail upon what is plainly a blunder, for the appellant, who paid the penalty at the time, has suffered no hardship by the conviction, and, in the circumstances, I cannot listen to any argument as to her having been concussed into paying a penalty which was rightly imposed. We are all of opinion that, down to the point of imposing the penalty, she was well convicted, and the penalty well imposed. But then, assuming that there is no hardship or concussion in the case, there is an obvious blunder in the concluding part of the sentence, and the question whether that blundered part can be excised, or cut out, is really the question which we have here to decide. Now, the case of *Rhodes*, which was quoted to us, appears to me to be on all fours with the present. There was there the same blunder in the sentence, of not allowing fourteen days to elapse for payment of the penalty before imprisonment followed on non-payment, and it was held that the sentence of immediate imprisonment, following on the imposition of the penalty, tainted the whole conviction, the Court apparently not thinking that the part of the sentence in which the blunder occurred could be cut out or separated from the remainder. I think that we should follow this

1884.  
 No. 49.  
 Ritchie  
 v.  
 Brown.  
 High Court,  
 Feb. 22.  
 Appeal.

precedent, and sustain the appeal, although I am sorry that this should be the result in the case of a person otherwise properly convicted.

LORD CRAIGHILL.—The question, it appears to me, is whether the conviction is good or bad. Whether or not there are cases in which one part of a sentence may be separated from another, and, eliminating the one, the other be held to be a good conviction, it is not necessary to inquire, for this certainly is not such a case. The question at issue must, therefore, be decided upon the sentence as it stands. That being so, there is no difficulty in reaching the true result, because we have the decisions in the case of *Rhodes v. Ross*, and in the case of *M'Donald v. Dobbie*, to guide us as precedents. I may add, however, that even if there had been no previous decision on the point, I would have concurred in the judgment proposed by Lord Young.

LORD JUSTICE-CLERK.—I also concur. I say nothing about the separability of the parts of a conviction and sentence from one another, though I rather think there may be such cases, for no question of that sort arises here. The sentence is not a sentence in terms of the statute, and therefore I think we are justified in answering the second question in the negative, taking the word 'conviction' to include the sentence.

LORD YOUNG.—I should like to say that what I call separability is a very considerable branch of the law, on which there are numerous decisions.

The following was the Interlocutor:—

'*Edinburgh, 22nd February 1884.*—Having considered this Case, and heard Counsel for the parties, Answer the second question in the Case in the negative: Therefore sustain the appeal: Find the appellant entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent.'

Agent for the Appellant.—W. OFFICER, S.S.C.  
 Agent for the Respondent.—PARTY.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ROBERT GRACIE, Suspender—*J. Campbell Smith*.

AGAINST

ROBERT LAIDLAW STUART, Respondent—*Brand*.

RESET — *CRIMEN CONTINUUM* — LOCUS — JURISDICTION — STATUTE 13 GEO. III., c. 31 (Act for the more effectual execution of criminal laws in the two parts of the United Kingdom) — EVIDENCE AS TO CHARACTER OF POSSIBLE WITNESS — WITNESS — COMPETENCY — STATEMENT BY PRISONER TO POLICE ON APPREHENSION — POLICE, QUESTIONS BY, TO THE PRISONER ON APPREHENSION. — A person convicted upon a criminal libel in the Sheriff Court of Edinburgh, which charged reset of theft in so far as the accused did, ‘at some place in the city or county of Edinburgh, to the complainer unknown, wickedly and feloniously receive and reset the watches above libelled, knowing the same to have been stolen’ — suspended and pleaded (1), That the libel was irrelevant in respect of insufficient specification of the *locus*, and (2), That as it had been proved that the panel had received the watches in Glasgow, not in Edinburgh, the Sheriff had no jurisdiction.

The Bill refused, and held that as reset was a *crimen continuum*, the libel was therefore relevant, and the objection to the jurisdiction bad. In a suspension of a conviction of the crime of reset, *held* that it was competent for the Prosecutor to lead evidence as to the character of the person from whom the accused in his declaration stated that he had received the goods alleged to have been resetted, and who was not in the Crown list of witnesses, and, though cited for the panel, did not appear.

Held that the statement made by a prisoner to a police officer on the occasion of his being apprehended, without threat or pressure, or intention to entrap, is competent evidence.

THIS was a Bill of Suspension and Liberation at the instance of ROBERT GRACIE, watchmaker and jeweller, Glasgow, who was convicted and sentenced to nine months’ imprisonment, upon 6th December 1883, before the Sheriff Court at Edinburgh, and a Jury, upon a criminal libel at the instance of ROBERT LAIDLAW STUART, the Procurator-Fiscal, which charged the reset of three

1884.

No. 50.  
Gracie  
v.  
Stuart.

High Court,  
Feb. 22.

Susp. & Lib.

1884. silver watches on 8th October 1883, '*at some place in the city or county of Edinburgh to the complainer unknown*,' and which it was stated in the libel were stolen in Glasgow, between the 10th and 16th of August 1883, '*by some person or persons to the complainer unknown*.'

No. 50.  
Gracie  
v.  
Stuart.

High Court,  
Feb. 22.

Susp. & Lib.

The suspender stated in the bill that he brought the watches from Glasgow, and that they were in his possession on 8th October 1883, the alleged date of the offence, and of which date also he was apprehended.

'That the truth was—and it is well known to the respondent—that the suspender did not receive or reset these watches anywhere in the county of Edinburgh, but purchased them in his own shop in Glasgow from a travelling dealer in watches and jewellery, named James M'Donald, whose name he, the suspender, gave in his declaration; and Paul Schlegel, a German watchmaker, was present on the occasion of the purchase. The statement of the *locus* of the alleged reset above quoted was made thus vague in order to conceal and evade the fact that the articles, if resetted at all, were resetted in Glasgow, and in order to give jurisdiction to the Sheriff Court of Midlothian by means of a false statement. In point of fact the said specification was insufficient in law, and the libel was therefore irrelevant.'

'It was contended for the suspender at the trial that even if guilty knowledge on the suspender's part had been proved, it was not proved that the crime libelled had been committed within the county of Edinburgh. The Sheriff, however, in charging the Jury on this point, said' :—

'The Procurator-Fiscal has not fixed upon the person, and did not require to fix upon the person, from whom the prisoner got the watches. The watches are found on the person of the prisoner on 8th October in Edinburgh. Something was said about the indictment being wrong, because you cannot hold it to be proved, as it was not in Edinburgh the prisoner obtained the watches. The Procurator-Fiscal does not say where he got them; he is not bound to do that. The prisoner may have raised the question and proved something. But I say to you as a matter of law—supposing that evidence is perfectly true, and it rests entirely upon that,—supposing it to be perfectly true that on 24th September he got these watches in Glasgow, and he resetted them and brought them to Edinburgh, and there through the hand of his friend disposed of them—that is reset of these watches in Edinburgh, and was rightly so charged in the indictment.'

The suspender further stated :—

1884.

No. 50.  
Gracie  
v.  
Stuart.

High Court,  
Feb. 22.

Susp. & Lib.

‘Neither the said James M‘Donald nor the said Paul Schlegel were included in the list of witnesses for the prosecution, and they were not examined at the trial; but to a witness, William Elliot, a sub-inspector of police, who was upon the list, the Procurator-Fiscal put the question, Are you aware that M‘Donald was convicted of reset of watches in 1866 at the Glasgow Circuit? The question was objected to, as well as the whole line of examination attacking the character of M‘Donald. The objection was repelled, and the witness stated that in 1866 M‘Donald was convicted of resetting thirty different watches and alberts, and sentenced to eight years’ penal servitude; that he was known by the name of “Jamie the Jeweller,” and that he was not aware that he dealt in watches, except stolen watches; that he had seen him often about Schipka Pass, in which the prisoner’s shop was, but never in the shop; that he was at present travelling in Ireland with two other thieves; that since he underwent the eight years’ penal servitude he had been convicted in Downpatrick, in Ireland, and sentenced to eighteen months’ imprisonment. And, in cross-examination, the witness further deponed that he knew where M‘Donald then was, and that he, the witness, was on the outlook for him in regard to a criminal charge, but that he had not been asked to find him in reference to the present case; that it was too much expense to bring him from Ireland. And Duncan M‘Kinnon gave evidence to the same effect, except that he said the *locus* of the conviction was in Dublin, and that he was not present when M‘Donald was convicted in 1866; that he had known him for years to be a constant associate of thieves; that he had no honest means of livelihood so far as he was aware, and that he believed he dealt in watches and several articles: but that he believed all these articles were stolen, either by himself or by thieves with whom he kept company.’

‘The officer who took the suspender into custody deponed at the trial, that about half an hour after he took the suspender to the police office, and when he was in charge, he asked him some questions, and, in particular, questions as to where he got the watches, and the Procurator-Fiscal thereupon asked what the suspender said in answer, whereupon counsel for the suspender objected to evidence of what he said in answers to questions put by a policeman in the circumstances as being an irregular declaration. The Sheriff repelled the objection, and the witness then deponed that the suspender said that he had bought the watches from a man named Thompson, and half an hour afterwards said that he had bought them from a Mr Phillips from Liverpool, both of which statements were false.’

In the Bill it was pleaded—1. The libel being irrel-

1884.  
 No. 50.  
 Gracie  
 v.  
 Stuart.  
 High Court,  
 Feb. 22.  
 Susp. & Lib.

evant, the complainer is entitled to have suspension awarded, with expenses. 2. The conviction of the complainer having proceeded upon incompetent evidence the sentence pronounced upon him ought to be quashed and vacated. 3. The respondent's attacks upon the character of M'Donald, whom he ought to have called as a witness, being contrary to law and practice, and gross injustice to the complainer, the sentence ought to be suspended. 4. Further, the sentence ought to be suspended in respect that the Sheriff misdirected the Jury in point of law, and that he had no jurisdiction apart from the legal fiction that the mere possession of a stolen article within his county gives him jurisdiction wherever the theft or reset may have been committed.

J. CAMPBELL SMITH, for the suspender, contended—There is no proper *locus* set forth in this libel. What is contained in the libel as a *locus* has been libelled in order to constitute jurisdiction within the county or city of Edinburgh. The crime of reset is committed when the articles stolen have been received in the guilty knowledge that they were stolen, and there is no jurisdiction in any Court except the High Court of Justiciary, to try for the offence, except in the judge of the district in which the articles were first received. The mere detaining or having in possession of a stolen article in the knowledge that it has been stolen, even with the intention of withholding it from the true owner, is not reset committed in the place in which it is so retained. The law of *crimen continuum* does not apply to reset otherwise the clause applicable to theft and reset of theft contained in the statute of 13 Geo. III., c. 31, the statute which makes provision for the mutual transmission between Scotland and England of such culprits who after committing crimes in one of those kingdoms have passed the border and retired into the other, would not have been required. That statute enacts that the thief and the resetter shall be excepted from its provisions, and may be tried in the kingdom in which he is found



with the articles in his possession, the presumption being that but for that enactment as the law then stood, the *locus* of those crimes was the place where the things were stolen or received, Hume, vol. ii. p. 55. In cases of reset, therefore, an inferior Court, as being the *forum deprehensionis*, has no jurisdiction unless the *locus delicti* is also situated within its territory.

1884.

No. 50.  
Gracie  
v.  
Stuart.High Court,  
Feb. 22.

Susp. &amp; Lib

The LORD JUSTICE-CLERK.—Reset is a continuous crime. This is not the *forum deprehensionis*, but the place where the accused has committed the crime of reset. If you find a resetter in any county you have only to prove that he had the stolen articles in his possession in the knowledge that they were stolen, and that he retained them from the owner. That is surely very elementary law.

LORD YOUNG.—According to your contention, if a man is apprehended with stolen articles in his possession, and says, I know the things were stolen, but you cannot find out where I first got them, he may set the authorities at defiance, and say that he means to keep them. You say that is quite legal.

J. CAMPBELL SMITH, for the suspender.—I say only that he shall not be tried in Edinburgh, unless before the High Court, for having articles in his possession there which he, it is well known, received in Glasgow; and if it is to be held that Edinburgh is also a *locus*, the indictment ought to have set forth that the suspender was apprehended in Edinburgh, which it does not. But assuming that reset is a continuous crime, and that Edinburgh was a competent *forum*, the latitude taken in libelling the *locus* is too great. The fact of its being a continuous crime gave the prosecutor a choice of *loci*, and the panel is entitled to have the crime individualised by the specification of a *locus*. *Maxwell v. Black and Morrison*, High Court, June 1, 1860, Irv., vol. iii. p. 592. Secondly, upon the third plea. The attempt to attack the character of James M'Donald, who, although not adduced, was a possible witness, was incompetent.

1884.

No. 50.

Gracie

v.

Stuart.

High Court,  
Feb. 22

Susp. &amp; Lib.

Except in cases of rape, it is incompetent to attack the character of an actual or possible witness.

LORD YOUNG.—M'Donald was not an actual or possible witness; he was the man from whom you said you got the watches.

J. CAMPBELL SMITH, for the suspender.—No question as to the character of a witness can, we contend, be put to anyone except to himself. *Burns v. Hart and Young*, High Court, Dec. 19, 1856, Irv., vol. ii. p. 571. And, lastly, the answers to questions put to the suspender by the officer M'Kay, who apprehended him, half an-hour afterwards and while he was in custody, ought not to have been received as evidence. *Helen Ha-*  
*Perth*, Oct. 8, 1858, Irv., vol. iii. p. 181.

Counsel for the respondent was not called upon to reply.

The LORD JUSTICE-CLERK.—This is a bill of suspension and liberation in which the complainer says that he was wrongously convicted and committed to prison for a period of nine months. The charge is one of reset of stolen goods, and it is said the conviction should be quashed in respect that in his charge the Sheriff misdirected the Jury in point of law, to the effect that possession by the resetter of an article within this county gives him jurisdiction, and two questions were argued to us arising out of this alleged misdirection, which are both interesting and important, but which may be stated in a few words.

In the first place, it is contended that the Sheriff of Midlothian has no jurisdiction in this case, as it was not proved that the complainer got possession of the stolen property while within that jurisdiction. And in the second place, assuming the Sheriff had jurisdiction, then the indictment is irrelevant, in respect that too great latitude has been taken in libelling the *locus* of the alleged offence. Now, upon the first objection I have no doubt whatever, and I am surprised Mr Smith should have consumed so much time in arguing a proposition so

self-evidently untenable. The crime of reset is committed wherever and whenever any person detains from its rightful owner any article which he knows has been stolen. Mr Smith did not give us any direct authority for the proposition he stated, but he quoted a statute, the Act 13 Geo. III. cap. 31, which showed, he contended, that a resetter could not be tried in a different jurisdiction from that in which he actually obtained the stolen property. But this statute refers to a perfectly different class of cases from the one we have here. It makes provision for the mutual transmission between Scotland and England of such culprits, who after committing crimes in one of these kingdoms have passed the Border and retired into the other. There was a conflict of jurisdiction between the two countries, and an Act of Parliament was necessary to settle the matter. It is beyond dispute that the resetter is committing a continuous crime during the whole time that the stolen article is in his possession, and although he may have passed through a great many places he is answerable to the Courts of each of these places if he went to them with the stolen articles in his possession.

Then, in regard to the other objection, that the latitude taken in libelling the *locus* is too great: It is said that the crime must have been committed in some definite place, and no doubt this is true in regard to many crimes. But it is different in the case of a crime like reset, which is committed wherever the accused goes with the stolen goods in his possession, and it is sufficient, I think, to charge it, as it is charged in the indictment, with having been committed 'at some place in the city or county of Edinburgh to the complainer unknown.' In regard, therefore, to the plea that the Judge misdirected the Jury, I do not think that the complainer has suffered any disadvantage.

Another set of questions arises upon the admissibility of some of the evidence which was led before the Sheriff.

The first of these relates to questions put to witnesses

1884.

---

 No. 50.  
 Gracie  
 v.  
 Stuart.

---

 High Court,  
 Feb. 22.

---

 Susp. & Lib.

1884.

No. 50.  
Gracie  
v.  
Stuart.High Court,  
Feb. 22.

Sess. &amp; Lib.

about the character of the man from whom the prisoner admits he had obtained the stolen watches. This is a nice question. It is said to be impossible to examine witnesses about the character of a possible or probable witness in the cause. If M'Donald had been present at the trial he might have been asked questions about his own character, and is the prosecution not entitled to ask those questions although he does not appear? The facts are these—M'Donald is cited as a witness at the trial for the defence, he does not appear when called, and then the procurator-fiscal asks the witness Elliot, a detective officer, the question—What kind of a man do you know this to be? He says that in 1866 M'Donald was convicted of resetting thirty different watches and alberts and sentenced to eight years' penal servitude; that he was known by the name of 'Jamie the Jeweller,' and that he was not aware that he dealt in watches except stolen watches; that he had seen him about the Schipka Pass, where the prisoner's shop was, &c. I do not think that this evidence is incompetent. I think it must be taken as a kind of cross upon the statement of the prisoner that he had got the watches from M'Donald. I am, therefore, not disposed to interfere with the conviction and sentence on that ground.

The next point is as to the questions put by the police officer M'Kay to the prisoner shortly after apprehending him. I have always discouraged such questions, but do not think that they are incompetent evidence. In some cases the question may arise quite naturally, and without any intention to entrap or obtain information unfairly.

On the whole matter, I am for refusing the bill.

LORD YOUNG.—I am of the same opinion, and I wish to observe that there is no incompetency in such questions as those which your Lordship has last referred to. The rule is that a statement made by a person on the occasion of his being apprehended, without threat or pressure, is competent, but if it shall appear that the

matter was carried too far the Court will stop the examination on the ground of fairness to the prisoner. It is not a question of competency at all.

LORD CRAIGHILL concurred.

The following was the Interlocutor :—

‘*Edinburgh, 22nd February 1884.*—Having considered the Bill, and heard counsel for the parties: Refuse the Bill, and decern: Farther, grant warrant to all proper officers of the law in possession of this warrant, or an extract thereof, to apprehend the complainer, Robert Gracie, and convey him to and imprison him in the prison of Edinburgh, therein to remain during the unexpired period of the sentence pronounced against him in the inferior Court, the said period to run from the date of his reincarceration under this warrant.’

Agent for the Suspender—DANIEL TURNER, S.L.  
Agent for the Respondent—STUART & STUART, W.S.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

LACHLAN MACLEOD, Suspender—*C. Dickson.*

AGAINST

PETER ALEXANDER SPEIRS, Respondent—*Mackintosh.*

SHERIFF, POWERS OF — CONTEMPT OF COURT — PREVARICATION —

SHERIFF CALLED AS RESPONDENT IN A SUSPENSION—IMPRISONMENT, IMMEDIATE, FOR CONTEMPT OF COURT — SUSPENDER PRESENT, RESPONDENT ABSENT — SPECIFICATION OF OFFENCE—CONVICTION.—At the conclusion of the examination of a witness in an action in the Sheriff Court, under the Debts Recovery Act, 1867, the Sheriff ordered the pursuer to be taken into custody on the ground ‘that he had disguised the truth and not told the whole truth,’ and the following conviction and sentence was thereupon pronounced: ‘The said witness having been duly sworn to tell the truth, and having grossly prevaricated in his evidence in the examination, the said Sheriff-substitute finds him guilty of contempt of Court, and therefore sentences and adjudges him to be imprisoned for the space of ten days from this date with hard labour.’

The witness brought a Bill of Suspension calling the Sheriff-substitute

1884.

No. 50.  
Gracie  
v.  
Stuart.

High Court,  
Feb. 22.

Susp. & Lib.

as respondent, and pleaded that the conviction and sentence was pronounced without any complaint setting forth the charge having been served upon him, and without a sufficient specification of the particular acts of prevarication of which he had been found guilty being set forth in the conviction. Counsel for the Sheriff-substitute stated to the Court that he had been advised that it was not consistent with his official position to appear as a party.

The Court (diss. Lord Young) refused the Bill, being of opinion (1) That the Sheriff had jurisdiction to proceed, *proprio motu*, and to punish, *de plano*, without complaint, for prevarication on oath committed before him ; and (2) that it was unnecessary to set out in the warrant the particular acts warranting the conviction.

Held (diss. Lord Young) that the Sheriff-substitute was right in not appearing as a party.

1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

THIS was a Bill of Suspension at the instance of LACHLAN MACLEOD, a shepherd in the employment of Alexander MacLeod, tenant of the farm of Scuddaburgh, and innkeeper at Stenscholl, in the parish of Portree, Isle of Skye, of a conviction of contempt of Court, by 'having grossly prevaricated in his evidence' upon oath, pronounced by the respondent, PETER ALEXANDER SPEIRS, Sheriff-substitute of Inverness, Elgin, and Nairn, at Portree. Also for liberation from a sentence of ten days' imprisonment with hard labour, pronounced thereon.

It appeared from the statement in the Bill, that a mare belonging to a person named Martin Martin, tenant of the farm of Valtos, which immediately adjoins the said Alexander MacLeod's farm of Scuddaburgh, having, along with another mare and two foals, strayed and been found trespassing on the latter farm, the suspender had, in terms of the instructions of his master, the said Alexander Macleod, impounded them for a day, and had set them at liberty the following morning ; and that, Martin's mare having died shortly afterwards, an action under the Certain Debts Recovery Act was brought by him before the Sheriff Court at Portree, against the suspender and his master, concluding for £20 as the value of the mare, on the ground that the mare had died from having been placed in a ruined hut and left there without food, water, or attention, and that notice

of the impounding had not been given to the owner, Martin. The suspender was adduced and examined as a witness for the pursuer in the action ; and it was in the course of his examination as such before the Sheriff-substitute that the offence was alleged to have been committed. It was stated in the Bill that the suspender's evidence was taken down by the Sheriff-substitute, and was not impugned and no complaint for prevarication or perjury was preferred at the instance of the public or other prosecutor. That immediately at the conclusion of the suspender's examination as a witness the Sheriff (the respondent), without hearing the suspender, ordered him to be taken into custody. That not knowing the English language, the suspender did not know what was taking place, and upon his agent remonstrating and demanding to be informed why the suspender was taken in charge, the respondent replied that he was to be committed for contempt of Court ; ' that he had disguised the truth and not told the whole truth,' and that the sentence complained of was thereupon written out ; and that upon the agent requesting to be heard in the suspender's defence, the respondent refused, saying that the sentence was written out and there was no use.

1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

The following was the sentence complained of:—

' *Portree, 1st November 1884.*—Sitting in judgment, Peter Spiers, Esquire, Sheriff-substitute of Inverness, Elgin, and Nairn, in the action depending before the Sheriff of said shire, at the instance of Martin Martin, tenant, Valtos, pursuer ; against Alexander MacLeod, farmer and innkeeper at Stenscholl, and Lachlan MacLeod, servant to the said Alexander MacLeod, and residing at Raishburg, the said Lachlan MacLeod being present as a witness for the pursuer, and having been duly sworn to tell the truth, and having grossly prevaricated in his evidence in the examination, the said Sheriff-substitute finds him guilty of contempt of Court, and therefore sentences and adjudges him, the said Lachlan MacLeod, to be imprisoned for the space of ten days from this date, with hard labour, and thereafter to be set at liberty ; and for these purposes grants warrant to officers of the law to convey him, the said Lachlan MacLeod, from the bar to prison accordingly, thereafter to be dealt with in due course of law.'



1884. In the bill it was pleaded—The complainer is entitled to suspension of the said warrant and liberation as craved, in respect (1.) That the sentence was unjustifiable and oppressive, and was passed without the complainer or his agent being heard in his defence against the same, and without any complaint or indictment setting forth the charge against him having been served upon him. (3) That the warrant does not contain or set forth any relevant or sufficient statement of any particular act or acts of prevarication, of which the complainer was found to be guilty. (4) That the warrant is inept in respect that it does not mention any place of imprisonment.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Susp. & Lib.

DICKSON, for the suspender, contended—There ought to be materials in the case to lay before this Court to enable it to judge whether the crime of prevarication on oath was or was not committed on the occasion, otherwise a judge might err with impunity by committing a witness to prison as guilty of prevarication, whose conduct did not admit of being so interpreted. And even assuming that it is not *ultra vires* of an inferior judge to commit *de plano* for contempt of Court, where no complaint is served upon the accused, the conviction ought to contain a specification of the Act or Acts of prevarication constituting the contempt of Court. *Laurie v. Roberts*, High Court, May 26, 1882, Couper, vol. iv. p. 606. In that case the Bench differed upon the question as to whether the acts, of which the complainer was there convicted, did amount to contempt of Court. And in the case of *Adam Baxter and Others*, High Court, March 4, 1867, Irv., vol. v. p. 351, the interlocutor of Court referred back to a deposition of the witness, recorded *ad longum* in the Books of Adjournal, as the ground of conviction for prevarication.

MACKINTOSH, for the respondent, stated that, acting upon his advice, the respondent had not appeared. That having acted from a sense of public duty, and in his public capacity as a judge in pronouncing the sentence

complained of, the Sheriff has conceived that he had no right to appear, but he will be ready to afford to the Court any information in the form of a report, or in such other manner as the Court may ordain.

1884.

No. 51.  
MacLeod  
v.  
Speira.

The case was thereupon taken to avizandum, but no order was made for the reincarceration of the suspender, who was in attendance.

High Court,  
March 18.

Susp. & Lib.

At advising,

LORD ADAM.—The matter complained of in this suspension is a warrant of imprisonment, dated at Portree on 1st November 1883, by which the Sheriff (Spiers) found the complainer, Lachlan Macleod, guilty of contempt of Court, and sentenced and adjudged him to be imprisoned for the space of ten days, from the date of the warrant, and thereafter to be set at liberty. The contempt of Court which Macleod is said to have committed is set forth in the warrant as being that he being present as a witness for the pursuer (of the action in which he was examined), and having been duly sworn to tell the truth, grossly prevaricated in his evidence in his examination.

The warrant was pronounced in the course of the proceedings in an action, depending in ordinary course, before the Sheriff Court of Inverness, in which Martin Martin, tenant, Valtos, was pursuer, and Alexander Macleod, farmer at Steinscholl, and the complainer, Lachlan Macleod, were defenders.

The only person called as respondent in this suspension is the Sheriff-substitute himself. He has not appeared in these proceedings, and we have in consequence had no argument in support of the warrant of imprisonment. But although I much regret that we have not had such argument, I think it right to say that, in my opinion, the Sheriff has been rightly advised in not appearing to defend the judgment.

I have, in the first place, no doubt that it was competent for the Sheriff, sitting in the Sheriff Court, to punish for contempt of Court.

1884.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Susp. & Lib.

Mr Erskine (i. 2, 8) says,—‘ In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated ;’ and a little further on he says,—‘ By the same rule every Judge, however limited his jurisdiction may be, is vested with all the powers necessary, either for supporting his jurisdiction and maintaining the authority of the Court, or for the execution of his decrees.’

In the case of *Hamilton v. Anderson*, reported 3 Macq. App. Ca. 363, the Sheriff-substitute had suspended Hamilton, a procurator of his Court, for one month for failure to obey an order to expunge a certain statement from the record. Hamilton thereafter raised an action of damages against the Sheriff, which ultimately went to the House of Lords. In giving judgment the Lord Chancellor says,—‘ It is clear that every Court must possess, inherently in itself, a power to prevent any contempt of its proceedings, and, undoubtedly in general it must exercise a controlling and censorial power and authority over the officers practising in the Court.’ Lord Cranworth also in the same case quotes and adopts the description of the powers of the Sheriff Courts in this respect given by the Lord Justice-Clerk (Hope) in the Court below. ‘ It is,’ he says, ‘ the case of an action by a practitioner, in what I must call the Superior Courts, against a Judge, not for something done extrajudicially, but because, according to the opinion of that practitioner the Judge made an order which he thinks was not a correct order.’ ‘ I have said that the Court (the Sheriff’s Court) must be considered as one of the Superior Courts. What is meant exactly by “the Superior Courts,” as the expression is applied in different countries, it is difficult to define ; but I take it thus from the judgment of the very learned Judge whose loss we all deplore, the late Lord Justice-Clerk, who gives the description of the Sheriff Courts :—“ Their position ” (he says) “ is quite different from that of Justices of the

Peace, alluding to a case of different circumstances where an action had been brought against a Justice of the Peace, not for something that he had done, but for something he had said extrajudicially in the opinion or judgment he had pronounced. "They" (that is these Courts) "are not only—to use an English phrase—Courts of Record" (with great deference I think that is a mistake—the term "Court of Record" has a definite meaning) "but Courts of very high authority. Their jurisdiction in many branches of the law, and especially in regard to the ordinary transactions between man and man, is co-extensive with that of the Supreme Court. Their proceedings are conducted by regular pleadings in as formal a manner, their procedure is regulated by statute, and by the rules prescribed by the supreme Courts. Their Judges are permanent, not acting voluntarily on particular occasions, as suits their own convenience; or according to the taste they have for particular cases. Their functions are not limited, as that of the Justices, to a particular class of cases; their jurisdiction is not summary, like that of the Justices." Therefore, as the Lord Justice-Clerk points out, the Sheriffs are Judges presiding in Courts of the very highest importance in that part of the United Kingdom.'

1884.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Susp. & Lib.

It appears to me, therefore, both on principle and authority, that the Sheriff has powers to punish for contempt of Court. Indeed I do not see that there is in this respect any difference between a Sheriff and a Judge of the Supreme Court. With reference to the case of *Laurie v. Roberts*, which was quoted to us, it seems to me to be quite unnecessary for the purposes of this case to inquire whether, apart from statute, police magistrates have not similar powers.

Assuming, then, that the Sheriff has power to punish for contempt of Court, I do not doubt that he was entitled to punish gross prevarication on oath summarily by imprisonment as being a contempt of Court. Baron Hume, vol. i. p. 380, thus describes prevarication:—

1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

‘Before I close this chapter,’ he says, ‘it will not be amiss to add a word or two concerning prevarication upon oath, or the wilful concealment of the truth ; which is next in degree to perjury, and seems chiefly to differ from it in the inferior boldness of the culprit ; who, though desirous to mislead the Judge and make a false impression, has rather chosen to compass this object in the way of an artful and tricking oath than by the direct averment of utter falsehoods ; or, if he has ventured on any such, has not persisted in them till the close of his oath. This sort of guilt is chiefly to be gathered from the equivocal answers of the witness, the inconsistency of the different parts of his oath, and his affected ignorance and want of memory with respect to things which he cannot but know, more especially if he is at last driven from all these shifts, and is constrained to emit true, though, taken on the whole, an incoherent and contradictory deposition. As a scandalous contempt on the presence of the Court and of the reverence of an oath, this offence may be summarily punished by the Judge before whom it happens (and it rather appears only by him and only at that time) with imprisonment or in a more flagrant case with infamy and pillor. Many examples of both are to be found as well in the Books of Sederunt as of Adjournal.’

Again, Baron Hume, vol. ii. p. 138, when treating summary conviction, points out that the ordinary mode of trial is by assize, but that this is subject to exceptions :—‘In that view,’ he says, ‘every Judge, of whatsoever degree, has power to punish summarily, at his own motion, all such disorders or misdemeanours committed in Court during the progress of a trial, a disturbance of the Judge in the exercise of his functions, or a violation of that deference which ought to be observed towards him when proceeding in his official capacity.’

After dealing with certain of these disorders and demeanours, he goes on to say,—‘On these occasions there seem to have been sufficient re-

summary chastisement of the proceedings, though tending only in a more remote way to the injury of justice : And still less can there be any doubt of applying the right correction in the case of any direct attempt, in the course of a trial or the preparations for it, to detain, mislead, overawe, or corrupt the witnesses ; or to alter, suppress, or destroy the written or other articles of evidence ; or to conceal or pervert the truth ; or to communicate with and influence the assize ; whether this be on the part of the prosecutor or the panel, or their friends and favourers, or of one witness with respect to another, or on the part of the witnesses themselves in the course of their examination. Hence the numerous instances, unhappily too numerous to be recited, of the commitment or other censure of witnesses for prevarication on oath or obstinate concealment of the truth.'

Sir A. Alison's Prin., p. 484, says—'Prevarication or wilful contradiction on oath is an offence punished summarily by the pillory or imprisonment at the moment the offence is committed.' 'More lately,' he says, 'since the punishment of the pillory has fallen, comparatively speaking, into disuse, the usual course has been, when a witness has clearly prevaricated upon oath, to sentence him summarily, *de plano*, to imprisonment or hard labour in Bridewell for a limited period, generally for six weeks to three months.' He adds—'It is incompetent to punish a witness in this way because what he has said is at variance with previous testimony ; that must be done by a regular indictment for perjury. It is his contradiction of himself on oath which warrants this summary procedure.'

I do not doubt, therefore, the power of the Sheriff to punish summarily by imprisonment for prevarication on oath as being a contempt of Court. The question, however, remains whether, as regards either the form or substance of the proceedings, there is any ground for the interference of this Court with the judgment of the Sheriff.

1884.

---

 No. 51.  
 MacLeod  
 v.  
 Speirs.

---

 High Court,  
 March 18.

---

 Susp. & Lib.

1884. With reference to the form of the warrant, the complainer pleads that it is bad because it does not contain any relevant or sufficient statement of any particular act or acts of prevarication of which the complainer was found to be guilty. A form of conviction, setting forth the particular act or acts which the Judge thinks are proved, is not in accordance with our ordinary procedure and would be out of place in it, because the interlocutory finding the panel guilty in the general case refers back to the complaint or indictment in which the act or acts which are said to amount to the crime or offence charged are set forth with more or less specification. It is clear that this form of conviction enables a Court of review to judge whether or not the acts specified do or do not amount to the crime or offence charged, and we all know that there are numerous cases in which this Court has quashed convictions on the ground that the act specified did not constitute the crime or offence charged, and of which the panel had been convicted.

The conviction in this case, however, did not proceed on any complaint or indictment setting forth the act or acts complained of; and it is said that these ought to have appeared on the face of the conviction, because otherwise it does not afford the necessary material to enable a Court of review to judge whether the inferior Judge may not have erred, and may not have convicted the complainer in respect of acts which do not in fact amount to any crime or offence. It is of course true, that an inferior Judge, or any Judge may err and may convict in respect of acts which do not amount to a crime or offence, or even a breach of order in Court. Of that an example may be found in the before-mentioned case of *Laurie v. Roberts* May 26, 1882, Couper, iv. p. 605, where there was a difference of opinion on the Bench as to whether or not the acts of which the complainer was convicted did amount to contempt of Court. It might possibly be desirable that the form of proceedings in inferior Courts



should be such as to enable a Court of review, in all cases, to judge, *ex facie* of the proceedings, whether a particular conviction was right or wrong. But the question we have to consider is not whether such a course is desirable, but whether it is necessary by the existing law and practice of Scotland. In this case the conviction distinctly specifies the contempt of which the Sheriff convicted the complainer, viz., 'gross prevarication on oath.' We were not referred to any authority to the effect that the particulars or elements of the prevarication of which the Sheriff convicted the complainer should be set out in the conviction. We were referred to the case of *Adam Baxter and Others*, in the High Court, March 4, 1867, Irv., vol. v. p. 351, where the deposition of the witness was recorded *ad longum* in the Books of Adjournal, and the interlocutor referred to this deposition as the ground of conviction for prevarication. Such is the course which was followed in *Baxter's* case, but there is no rule on the subject, nor is the practice uniform. On the contrary, cases in which the deposition has not been taken down by the clerk, and in which there was no specification of the particulars or acts of the prevarication, occur again and again in the Books of Adjournal. Such was the case of *James Paterson*, Stirling Circuit, April 29, 1817; and *John Mackenzie*, High Court, January 11, 1823. Furthermore, in none of the cases, not even in that of *Baxter* already referred to, was the evidence, or any part of it, set forth in the warrant, and yet it is the want of that, or a particular specification of the acts of prevarication, which is here the gravamen of the complaint. If such a form of conviction be a valid form of conviction in the Superior Court, I do not see why it should not be a valid form in the Sheriff Court. The cases in which the question can occur are exceptional cases, like the present, where the Judge summarily convicts in respect of acts done or committed under his own eyes, and where, therefore, there is no written charge or complaint. In the com-

1884.

---

 No. 51.  
 MacLeod  
 v.  
 Speira.
 

---

 High Court,  
 March 18.
 

---

Susp. &amp; Lib.

1884. mon enough case, for example, of a person appearing  
 No. 51. intoxicated in Court, and being summarily punished for  
 MacLeod contempt of Court, I cannot think that it is necessary  
 v. that the acts which satisfied the Sheriff that he was  
 Speirs, intoxicated must be set forth in the conviction. Neither  
 High Court, in this case, if the Sheriff be satisfied that the witness  
 March 18. was prevaricating, do I think it is necessary that the  
 Susp. & Lib. particular act or acts should be set forth. That probably  
 could only be done by setting out at length the deposition  
 of the witness ; but the deposition of the witness  
 recorded by the Sheriff, as it was his duty to do, as  
 forms part of the process, and I cannot see that it would  
 be any advantage that it should be again set forth  
 at length in the judgment, or specially referred to in it.  
 In a case of prevarication, the conduct of the witness,  
 his mode and manner of answering questions while  
 under examination, and which cannot be adequately  
 recorded, are all matters so material that, in my opinion,  
 it is more than doubtful whether the mere written de-  
 position of a witness would afford adequate means to  
 enable a Court of review to determine whether or not  
 the witness had been rightly convicted of prevarication.  
 Upon this subject I will only add that the form of the con-  
 viction appealed against is that which has been furnished  
 as a style in Mr Barclay's 'Digest of the Law of Scot-  
 land, for use in inferior Courts, *voce* Prevarication.  
 From this it is only reasonable to conclude that what  
 was done by Sheriff Speirs was not inconsistent with the  
 practice in the Sheriff Courts.

The complainer further complains that there was no  
 complaint or indictment setting forth the charge against  
 him, and that no evidence was led previous to the granting  
 of the warrant with the view of rebutting or con-  
 tradicting the complainer's evidence. But, as I have  
 already said, the offence, if committed, was one which  
 was punishable *de plano*, and the evidence of its com-  
 mission was to be found, not in any extraneous evidence  
 but in the examination of the complainer himself.

The complainer further complains, generally, that the conviction was unjustifiable and oppressive; but I do not see that there are any grounds calling for proof or inquiry. There is no reason for interfering with the conviction on the ground of oppression in respect of the length of the sentence of imprisonment. Numerous cases will be found in the books where much longer sentences were awarded than in this case.

I have, I think, now dealt with the whole grounds of suspension which were maintained before us, and I am of opinion that the bill should be refused.

LORD CRAIGHILL.—The opinion of Lord Adam was communicated to me, and is our joint opinion. I entirely concur.

LORD YOUNG.—The complainer asks suspension of a sentence of imprisonment with hard labour pronounced against him by the Sheriff-substitute at Portree for ‘contempt of Court,’ committed by his ‘having grossly prevaricated in his evidence’ as a witness for the pursuer, in an action in the Sheriff Court at Portree in which he was a defender. The material grounds of suspension are—1st, that the sentence was pronounced without any charge preferred, and without hearing the complainer or his agent in his defence; and 2d, that the sentence does not set forth a relevant or sufficient statement of any act of prevarication of which the complainer was found guilty.

The complainer avers that he gave his evidence in Gaelic; that being ignorant of English ‘he did not know what was taking place’ after he gave it; and that the Sheriff-substitute refused his agent’s request to be allowed to speak in his defence.

The Sheriff-substitute is called as respondent, and the bill of suspension was by order of this Court served upon him accordingly. When the case came on for hearing Mr Mackintosh appeared for him, and stated that, acting on his advice, he declined to appear as respondent in the suspension, but that he would, in the form of a report,

1884.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Susp. & Lib.

1884.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Susp. & Lib.

afford any information which the Court might desire on a remit being made to him for that purpose. We had of course, no power to compel him to appear as respondent, but I ventured to express my own opinion to the effect, that if he meant to defend the sentence which the complainer impeaches, the regular and proper course was to appear and do so at the bar in the usual way. Your Lordships thought otherwise, and so the case was heard *ex parte*, and we must decide it without the aid of any explanation or argument on behalf of the respondent. But before addressing myself to the merits of the case, I think it is proper that I should explain distinctly my own views of this question of regularity and propriety of procedure on which I have the misfortune to differ from your Lordships.

I must assume, and indeed think it clear, that there is a competent process regularly before us in which we must pronounce a decision. The complainer, who appeared both personally and by counsel, is one of the parties to that process. On the face of it, the Sheriff-substitute at Portree is the other, and the only other—so that if he is not competently and regularly called as respondent, the process must fail on that ground. The person called as sole respondent in a bill of suspension may shew that not he but some other is the proper respondent, or the Court may possibly so decide without appearance by the person erroneously called. But the notion of a bill of suspension without any proper respondent or contradictor in existence is too novel, and indeed absurd, to be entertained for a moment. When an inferior Judge or Magistrate, without any charge laid before him, without any motion by a party in a cause before him, at his own hand sentences a subject of the Queen, whether a party to a cause, or a witness in a cause, or a stranger present in his Court, to imprisonment with hard labour for conduct which he deems to be a contempt of Court, and the sentence is duly impeached in this Court as illegal, I should have thought



it not doubtful that the Magistrate is himself the proper respondent to be called as contradictor to defend it. If he is not, there is certainly no other, and such a sentence must either be unassailable in this Court, or be complained of in a process to which there is no respondent. A sentence is indeed usually and properly defended by the party at whose instance or on whose motion it was pronounced. But if the Magistrate pronounces it at his own hand in vindication of his dignity, he is clearly the proper party to defend it if he sees fit, and, indeed, to judge, in the first instance, whether it is defensible, having regard to the grounds on which it is impeached. It is *prima facie* presumable that he acted from a sense of public duty, and I should have thought that the same sense of duty would induce him to defend it, or abandon it (if, on consideration, satisfied that he was in error), when his conduct was complained of in this Court. The cost is not considerable, and the Treasury, on the advice of the Lord Advocate, would probably see that a conscientious magistrate, like a conscientious public prosecutor, was indemnified of the costs properly incurred by him in defending his public conduct. That it is incompatible with the dignity of a Sheriff-substitute to appear as a respondent in this Court is an idea almost too ridiculous to be expressed.

In the absence of the only respondent called, and the only possible respondent, we must necessarily consider the case on the complainer's uncontradicted statement of facts and the terms of the sentence. Taking it as it is thus presented, it may, I think, be decided without determining the general question whether a Sheriff may in any circumstances punish contempt of Court by a sentence of imprisonment. That question has not, so far as I know, hitherto occurred for judgment, and I would rather reserve my opinion upon it till it is presented more purely and simply than in the present case. That a Sheriff may do what is necessary to maintain order and decorum in his Court, or to enforce an order requiring to

1884.

---

 No. 51.  
 MacLeod  
 v.  
 Speira.
 

---

 High Court,  
 March 18.

---

 Susp. & Lib.

1884. be obeyed on the instant, may be assumed, although  
 No. 51. venture to think it doubtful whether a sentence of in-  
 MacLeod prisonment, with or without hard labour, is within h  
 v. power as a necessary or proper proceeding for this pu  
 Speira. pose. The fact that it has never, so far as any of  
 High Court, know, been resorted to is a strong argument against i  
 March 18. necessity, and if unnecessary it is certainly unwarrant  
 Susp. & Lib. able. The Judges in the Police Court of Edinburgh a  
 by statute empowered to punish contempt of Court with  
 a limited period of imprisonment. But the power being  
 given by statute, and within specified limits, is itself an  
 argument, though not a conclusive argument, against  
 the notion of such power being inherent in inferior  
 Judges. I know of no authority for saying that it is  
 and certainly no instance of the exercise of such a power  
 has hitherto occurred, or at least been brought under the  
 notice of the Supreme Court.

There are no doubt many recorded instances of the  
 Lords of Justiciary having summarily sentenced wit-  
 nesses in criminal cases to imprisonment and other  
 punishments for prevarication. I should have thought  
 these cases not in point, and that for several reasons, all  
 of them, I think, strong. In the first place, the Lords of  
 Justiciary are supreme Judges. In the second place  
 they have pronounced such sentences in the exercise not  
 of civil but of criminal jurisdiction. In the third place  
 they did not confine their punishments to imprisonment  
 but went the length of banishment, mutilation (as by  
 cropping the ears), whipping, and setting in the stocks  
 and pillory. These barbarities diminished with advancing  
 civilisation, and at length disappeared. During the  
 present generation there has not, so far as I know, been  
 an instance of even imprisonment so inflicted by a Judge  
 of this Court. My own memory, and I may say experi-  
 ence of the Court, extend over a long period, and I have  
 never known of one.

It is not in the present day thought expedient, or even  
 reasonably safe, to find a party guilty of a criminal

offence, and punish him as a criminal accordingly, without a regular prosecution and charge, and the ordinary safeguards of a trial, on the fiction of a contempt of Court, for it is in truth only a fiction. Prevarication by a witness on oath—if such as may fittingly be punished by imprisonment with hard labour, not to speak of banishment, or the pillory—is crime, and modern ideas are against regarding it as a constructive contempt so as to warrant such punishment on the spot without trial, and I, for my part, am strongly against countenancing the introduction into inferior Civil Courts of a high-handed summary procedure founded on a fiction, which has long been practically abandoned in the Supreme Criminal Court, where alone, so far as I know, it was ever adopted.

The practice of the Supreme Civil Court is, I should think, more to the purpose, and I venture to say that it has never at any time been the practice of the Supreme Civil Court to punish witnesses summarily by imprisonment for prevarication. I may even, I think, go the length of asserting that there is no reported case of a Judge of the Court of Session having done so.

Still more in point is the practice of the Sheriff Courts, and without presuming on a universal negative—for I cannot speak of what may have been done without being brought under the notice of the Supreme Court—I venture to assert that it has not been the practice of Sheriffs in their Civil Courts to sentence witnesses in civil causes to imprisonment for prevarication, and that not a single instance of such a proceeding has been brought before the Supreme Court.

Here, according to the only information before us, the Sheriff-substitute of Portree, sitting in his Civil Court, summarily sentenced a defender in a civil cause depending before him to be imprisoned with hard labour for ten days because he ‘grossly prevaricated in his evidence’ as a witness called by his adversary in the cause. If this proceeding is defensible at all, it is not upon prece-

1884.

No. 51.  
MacLeod  
v.  
Speira.

High Court,  
March 18.

Sump. & Lib.



1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

dent, for there is none. Such a thing was never done before, and I must decline the responsibility of concurring in a judgment which will make a precedent for any similar proceeding in future.

But this, although, in my opinion, sufficient to quash the sentence, is not all, for the complainer avers that he was not informed wherein the supposed prevarication consisted, and that the law-agent who was present, and charged with his interests as a party to the cause, was refused a hearing although he demanded it. This is no doubt a grave impeachment of the Sheriff-substitute's conduct, but it may be true, and I cannot say it is irrelevant. The Sheriff-substitute declines to appear to contradict it or give any explanation whatever, and I cannot simply disregard it or decide the case on the assumption that it is untrue. Your Lordships altogether ignore it, no doubt for some reason, though it does not occur to me what it is. But farther, the sentence gives no information whatever as to wherein the supposed prevarication consisted. The complainer says he was not informed and does not know, and I must say that is my own condition. I have not been informed, and do not know. We do, indeed, know that the Sheriff-substitute thought that the complainer 'grossly prevaricated in his evidence,' but we know no more, for these words which I have cited from the sentence comprise all that has been communicated to us. But we are sitting as a Court of review on a reviewable sentence. If we are not, the whole procedure before us is a farce; but, if we are, the question is so simple as this, whether a party to a civil cause is liable to be imprisoned with hard labour on a general statement by a Sheriff-substitute that he had 'grossly prevaricated in his evidence as a witness,' and that, on being satisfied that the Sheriff-substitute thought so, we must affirm his sentence, having no concern with whether he was right or wrong. I thought it had been firmly established that a reviewable sentence must either in itself, on the face of it, or by reference, give such infor-

mation of the facts held to be established as may enable the Court of review to determine whether or not the inferior Judge who pronounced it was in error, and that, if it does not, that is in itself sufficient reason for setting it aside. I appreciate the difficulty of defining prevarication, and of specifying wherein it consists in any particular case. It is a loose and indefinite term, which may mean many different things short of perjury; the general idea which it conveys is manifest unwillingness candidly to tell the whole truth, fencing with questions in such manner as to shew reluctance to disclose the truth, and a disposition to conceal or withhold it. So regarded, it is difficult of specification undoubtedly. But only fancy the expression or opinion of a Judge to this effect, stated as a reason for sentencing a party to a civil cause to imprisonment with hard labour! A distinct falsehood sworn to, although detected and exposed or even confessed on cross-examination, could be clearly stated without difficulty. What was the prevarication here (in the Sheriff's estimation) nobody but himself knows, or it is perhaps more accurate to say this Court has not been informed.

The case of *Hamilton v. Anderson* has, in my opinion, no bearing on the question before us. It was decided in that case (1st) that a Sheriff-substitute had jurisdiction to suspend a practitioner before his Court for contumaciously refusing to obey a lawful order of the Court, of a nature admitting of and requiring instant obedience; and (2nd) that, even if the order was not lawful (although it was held to be so), the practitioner had no cause of action against the Sheriff-substitute. I am unable to conceive how the case is supposed to be in point. The notion that a sentence of imprisonment pronounced by a Sheriff-substitute, and not final by statute, is not reviewable in the Supreme Court was certainly not mooted in that case. From the citations which my brother Lord Adam has made from the report, I infer that he thinks the case in point, because the Sheriff

1884.

---

No. 51.  
MacLeod  
v.  
Speirs.

---

High Court,  
March 18.

---

Susp. & Lib.

---

1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

Courts were spoken of as 'Superior' Courts—not technically as distinguished from 'inferior,' but colloquially you speak of a 'superior person' or a 'superior article.' Whether, on such sentence being quashed, the Sheriff substitute is subject to an action of damages is another question altogether, and does not arise here, where the only question is whether the sentence shall be upheld or set aside.

The only case of a sentence of imprisonment for contempt submitted to the review of this Court affords a striking illustration of the necessity, in the interests of justice, of requiring a specification of the very facts distinguished from the use of mere epithets. I refer to the case of *Lawrie v. Roberts*, 26th May 1882, 4 Coup. p. 606. There a police magistrate sentenced a man to three days' imprisonment for contempt of Court in grossly insulting the Judge. The language used being there set out, a majority of us were of opinion that it did not amount to insult or contempt, and so quashed the sentence. One Judge thought it did, but nevertheless agreed in the judgment, a sentence of imprisonment being, in his opinion, oppressive—not, of course, for a contempt by insulting language, but for the particular contempt set out in the sentence. Suppose the sentence there had been in such general terms as the one before us, and had only found that the party had grossly insulted the Court, and so was guilty of contempt, must, assuming the *ex facie* regularity of the sentence, have done an injustice, and left the party to suffer punishment for what (the facts being unnecessarily disclosed) we accidentally discovered to be no offence at all. One of your Lordships has spoken of oppression as the only ground for quashing such a sentence. But to imprison a man with hard labour for no offence but oppression, and, even if the oppression consist in the extent or character of the punishment being incommensurate with the particular offence actually committed, how, I venture to ask, can we judge of this without knowing the facts?

By refusing this suspension we should affirm the proposition that if a Sheriff-substitute sentences a party in a civil cause to imprisonment with hard labour for ten days (or ten months) because he had grossly prevaricated in his evidence as a witness, and so was guilty of contempt of Court, giving us no information except what these words convey, we can require no more, and must affirm the sentence. I cannot assent to that. I think the sentence is illegal, as it is certainly unprecedented. I should have thought so even if facts had been stated on the face of them shewing that the suspender had manifested an unwillingness to disclose, and an inclination to conceal, the truth of a particular fact within his knowledge, which he was at last compelled to reveal, for I think that is not an offence for which, by the law and practice of Scotland, a party in a civil action may in a Civil Court be summarily sentenced to imprisonment. But I think the want of specification is itself fatal, and if I am to assume the truth of the assertion in the bill, to the effect that the complainer was not at the time informed of any fact as to which the Sheriff thought he had prevaricated, and that his agent was refused a hearing, he himself being ignorant of the English language, I should think the case on its specialties a clear one for suspension irrespective of the larger question.

Lord Adam was good enough to communicate his judgment to me before it was delivered, and having read it carefully, and listened to it to-day with due attention, I desire, with all respect, to say that I find in it no reason for declining, as his Lordship does, to take any notice of the complainer's denial of prevarication, or of his averment that none was stated to him at the time, any more than is disclosed to us on the face of the sentence, and that he was peremptorily refused a hearing. Neither do I find in it any notice of what I must regard as the most important general feature of the case, viz., that the sentence is unprecedented, for I quite

1884.

---

No. 51.  
MacLeod  
v.  
Speira.

---

High Court,  
March 18.

---

Susp. & Lib.

---

1884.

No. 51.  
MacLeod  
v.  
Speirs.

High Court,  
March 18.

Susp. & Lib.

understand from both your Lordships that you did not, any more than myself, know of any case in which a defender in a civil cause had been summarily sentenced by a Sheriff to imprisonment with hard labour for prevarication—no such case has been mentioned. The Justiciary precedents alone, as I understand, are relied on by your Lordships, and certainly if these are hereafter, in deference to the judgment we are to pronounce, to be followed by Sheriffs in civil causes, we may have numerous sentences like the present, for since parties have been admitted as witnesses, what may be regarded as prevarication, and such constructive contempt of Court as that infers, is not uncommon. But it will be in vain to seek relief in this Court on a denial of any prevarication, on want of specification, or on refusal of a hearing, or indeed on any ground that at present occurs to me. For if the Sheriff shall only say that he is of opinion that the party prevaricated, we shall, following our present judgment, hold that sufficient to uphold the sentence, and refuse to hear anything to the contrary, or even listen to a request for particulars. Nor do I know any limit to the punishment, unless indeed we are to find that also in the Justiciary precedents. There is none by statute or by custom—for there is neither statute nor custom on the subject—a custom may possibly grow out of this Portree sentence and our judgment affirming it, but as yet there is none.

The following was the Interlocutor :—

*Edinburgh, 18th March 1884.*—Having considered this Bill and heard counsel for the complainer, there being no appearance for the respondent, refuse the Bill, and decern.

Agents for the Suspender—T. & R. B. RANKEN, W.S.

Present,

The LORD JUSTICE-CLERK,

LORDS YOUNG and CRAIGHILL.

AGNES DARGIE, Appellant—*M'Kechnie & Orr.*

AGAINST

WILLIAM BISHOP DUNBAR, Respondent—*Lang & Baxter.*

ADULTERATION OF FOOD—PUBLIC HEALTH—MILK—STATUTE 38 & 39 VIC., c. 63, SEC. 22 (Sale of Food and Drugs Act, 1875)—ANALYSIS, SOMERSET HOUSE.—The 22d section of the Sale of Food and Drugs Act, 1875, enacts, that the Sheriff before whom any complaint under the Act is made, upon the request of either party, at his discretion, may cause any article of food or drug to be sent to the Commissioners of Inland Revenue, 'who shall thereupon direct the chemical officers of their department at Somerset House to make the analysis, and to give a certificate to such Sheriff of the result of the analysis.'

Held (diss. Lord Craighill) that the reference under this enactment to the Somerset House officers is for the purpose of obtaining the result of their analysis merely, and that therefore their opinion as to what is the minimum percentage of fat to be found in new milk cannot be received as evidence.

THIS was an appeal upon a Case stated under the Summary Prosecutions Appeals Act, 1875, at the instance of AGNES DARGIE, shopkeeper, Perth Road, Dundee, against a conviction and sentence pronounced by the Sheriff-substitute, in the Sheriff Court, Dundee (John Cheyne, advocate), upon a complaint at the instance of WILLIAM BISHOP DUNBAR, Procurator-Fiscal of Court. The complaint charged the appellant with a contravention of the 6th section of the Sale of Food and Drugs Act, 1875, as amended by the Sale of Food and Drugs Amendment Act, 1879, 'in so far as on the 10th day of December 1883, or about that time, within the shop in Perth Road, Dundee, possessed by David Dargie, farmer and dairyman, Tarbrax, Inverarity, the said Agnes Dargie

1884.

No. 52.  
Dargie  
v.  
Dunbar.

High Court,  
March 18.

Appeal.

1884.

No. 52.  
Dargie  
v.  
Dunbar.

High Court,  
March 18.

Appeal.

did sell to William Patterson, sanitary inspector in the Dundee police, and George Beveridge, sanitary officer in said police, or one or other of them, threepence worth of milk as sweet milk, but which was not of the nature, substance, and quality of the article demanded, the same being deficient in fat to the extent of 8·3 per cent. or thereby, and was so sold to the prejudice of the said officers, purchasers thereof, whereby the said Agnes Dargie is liable to a penalty not exceeding £20 (twenty pounds), to be recovered in terms of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881.'

It was stated in the Case on appeal, that it was proved in support of the prosecution that on 10th December 1883, within the shop mentioned in the complaint, the said William Patterson and George Beveridge asked the appellant to supply them with threepence worth of sweet milk; that the appellant supplied them with a quantity of milk, for which they paid her threepence; and that they then and there informed her that they had made the purchase for the purpose of having the milk analysed by the public analyst, and they divided it into three parts, in the manner prescribed by the statute—one being delivered to the appellant, one being retained by the purchasers, and the other being handed on same day to Mr G. D. Macdougald, F. Inst. Chem., public analyst for the burgh of Dundee, who analysed its contents, and on 20th December 1883 issued a certificate or report in the following terms:—

#### BURGH ANALYST'S CERTIFICATE.

To the Commissioners of Police, Dundee.

I, the undersigned, public analyst for the burgh of Dundee, do hereby certify that I received on the 10th day of December 1883, from Mr Thomas Kinnear, sanitary inspector, Dundee, a sample of 'sweet milk,' marked 'B,' for analysis, which then weighed 8 ounces or thereby, and have analysed the same, and declare the result of my analysis to be as follows:—

I am of opinion that the said sample is deficient in fat to the extent of 8·3 per cent.



<i>Observations.</i>				1884.
This sample of milk yields—				No. 52.
Water,	.	.	88·70	Dargie
Total solids,	.	.	11·30	"
Consisting of fat,	.	.	2·20	Dunbar.
Solids not fat, .	.	.	9·10	High Court,
			<hr/>	March 18.
			<hr/>	<hr/>
			100·00	Appeal.

This milk, when received by me, was fresh and in a fit state to be analysed, no change having taken place in the constitution of the milk which would interfere with the analysis.

As witness my hand at Dundee, this 20th day of December 1883.

(Signed) G. D. MACDOUGALD, F. Inst. Chem.,  
Public Analyst.

Mr Macdougald was examined as a witness, and deponed that the above-mentioned certificate or report was correct ; that he was decidedly of opinion that the milk referred to in it was not genuine sweet milk as it came from the cow, but that it had been tampered with, either by the addition of skimmed milk, or by the abstraction of cream ; and that in forming this opinion he had proceeded upon what is known as the Somerset House standard, according to which no milk was regarded as genuine if it contained less than 2·4 per cent. of fat, and which he was satisfied, from his own experience of milk analysis, was a low standard.

On behalf of the appellant, Dr Stevenson Macadam, Ph.D., &c., lecturer in chemistry, Edinburgh, was examined, and deponed that he had, at the appellant's request, analysed the contents of the sealed vessel or bottle left with her as aforesaid, and that the result of his analysis thereof was correctly stated in the following report :—

*Analytical Laboratory, Surgeons' Hall,  
Edinburgh, 4th January 1884.*

I beg to report that I have made a careful chemical analysis of a sample of milk forwarded to me on the 25th ulto., by Thomas Lancett, clothier, 3 Reform Street, Dundee, in bottle sealed 'Police Office, Dundee,' and with sealed label attached thereto, 'Label No. B, Sanitary Department, Police Chambers, Dundee, 10th December

1884.	1883.	The article to which this label is attached was purchased by me to-day from Agnes Dargie, while in shop 117 Perth Road. Sweet milk. WILLIAM PATTERSON. GEORGE BEVERIDGE.'	
No. 52.			
Dargie			
v.			
Dunbar.			
High Court,		The sample was received in a sour and curdled condition, and partial fermentation had taken place. The analysis yielded as follows :—	
March 18.			
Appeal.		Total solids, per cent., by weight,	10·85
		Fat in solids, . . . . .	1·78
		Solids not fat, . . . . .	9·07
		Ash in solids, . . . . .	0·77

These results are in keeping with the milk being of genuine quality as cow's milk ; and when the fermented state of the milk is considered, I am of opinion that the milk, when fresh, would have given higher figures. I therefore regard the milk as free from admixture or adulteration.

(Signed) STEVENSON MACADAM, Ph.D., &c.,  
Lecturer on Chemistry.

Dr Macadam deponed further that, judging by the results he had himself obtained after partial fermentation had taken place, he thought Mr Macdougald's analysis might be accepted as pretty accurate ; but that, accepting Mr Macdougald's figures, he could not agree with him in pronouncing the milk not to be genuine sweet milk, being of opinion, as the result of an investigation which he had made, that the Somerset House standard was considerably too high. He admitted, however, that most analysts accepted the Somerset House standard.

The appellant was examined as a witness on her own behalf, and stated that the milk sold to the officers was sold just as she received it from the cart in which it had been brought in from her father's farm at Tarbrax ; that the milk-cans generally came to the shop sealed, but that she occasionally found the seals broken ; and that she could not say whether they arrived with the seals whole or broken on the day in question. The person who drove the cart from Tarbrax to Dundee was not examined ; but the appellant called her brother and sister, who work at the farm, and who stated the practice was for the milk to be poured direct from the milk-pails into the cans in which it was carried into Dundee.

In consequence of the difference in opinion between Mr Macdougald and Dr Stevenson Macadam, the Sheriff-substitute, on the motion of the prosecutor, ordered the clerk of court to transmit the third of the sealed vessels or bottles to the Commissioners of Inland Revenue, for analysis by the chemical officers of their department at Somerset House, and continued the case to 24th January 1884, when, on its being again called, the following certificate by the Somerset House analysts was produced :—

1884.  
—  
No. 52.  
Dargie  
v.  
Dunbar.  
—  
High Court,  
March 18.  
—  
Appeal.

*Laboratory, Somerset House,  
London, W.C.*

The sample of milk referred to in the annexed letter, marked ‘No. B.,’ ‘Dundee, 10th December 1883,’ and secured with seal bearing the words ‘Police Office, Dundee,’ was received here on the 12th instant.

We hereby certify that we have analysed the milk, and declare the results of our analysis to be as follows :—

Non-fatty solids,	.	.	8·55 per cent.
Fat, .	.	.	2·21 „
Water,	.	.	89·24 „
			<hr/>
			100·00
			<hr/>

No change had taken place in the milk which would interfere with the accurate estimation of the fat.

From a consideration of these results, we are of opinion that the milk has been deprived of at least 8 per cent. of its fat.

As witness our hands this 21st day of January 1884.

J. BELL, Ph.D.  
R. BANNISTER.  
G. LEWIS.

Thereafter, on considering the whole evidence, the Sheriff-substitute found as matter of fact, that the article supplied by the appellant as sweet milk to the said William Patterson and George Beveridge on the occasion libelled, was not of the nature, substance, and quality of sweet milk, being deficient in fat to the extent of 8·3 per cent. or thereby ; and the appellant was accordingly convicted of the contravention charged, and adjudged to pay a modified penalty of 5s. sterling, with £1, 12s. sterling of expenses, which sums were paid in Court.

1884.

No. 52.

Dargie

v.

Dunbar.

High Court,  
March 18.

Appeal.

The question of law submitted for the opinion of the High Court of Justiciary was—

‘Whether, on the facts above stated, the Sheriff-substitute was justified in convicting the appellant?’

M’KECHNIE and ORR, for the appellant.—The Sheriff-substitute was clearly of opinion that the evidence as it originally stood was not sufficient to warrant a conviction, otherwise he would not have called in the aid of the Somerset House authorities; and he seems to have proceeded to convict because the Somerset House report or certificate appeared to confirm the certificate and evidence of the burgh analyst. The Scotch chemists, however, had not substantially differed in their analysis, but in the inference only that fell to be drawn from it. And upon such a question an appeal to Somerset House was, we submit, valueless. Section 22 of The Sale of Food and Drugs Act, 1875, provides that the Somerset House analysts are to certify only the bare *result* of their analysis, without giving any opinion as to whether the natural constituents of the particular subject analysed were found in their proper proportions. Before such a certificate could become evidence of this, it would require to be sworn to, and the analyst cross-examined. But none of the Government analysts were here examined. It was therefore incompetent and unfair to receive as evidence their opinion as to whether the milk had been tampered with or not by addition to or abstraction from its natural constituents; for that was really the question involved in the judgment of the Sheriff. He says that the substance was not of the nature, substance, and quality of sweet milk. That was, we contend, an inference which he was not entitled to arrive at upon the face of the evidence. The Somerset House certificate, in so far as it was competent evidence, was unnecessary, and in so far as it might have been of value it was incompetent. It thus proved nothing, and as but for that certificate no conviction would have followed, this conviction is, we contend, bad in law and ought to be set

aside. Further, the case not being one of the admixture of a foreign ingredient no prejudice to the purchasers was proved. The mere fact that the milk was of an inferior quality—even if it had been to a small extent tampered with—does not necessarily imply prejudice. The purchaser may have paid a small price for the quantity he got.

LANG, for the respondent.—There was here no question of law—merely the question of fact whether the milk had been tampered with. Section 22 of the Sale of Food and Drugs Act, 1875, provides that the Somerset House certificate shall be issued when the Justices, in the exercise of their discretion, think it necessary to request an analysis; and section 21 provides that ‘the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated.’ The Somerset House certificate here concluded that the milk had been deprived of at least 8 per cent. of its fat, that is to say, in the words of the burgh analyst’s evidence, it was not genuine sweet milk, but had been tampered with, either by the addition of skim milk or by the abstraction of cream. And that reduced the question before the Sheriff to one of the quality of the milk in question, a question of fact, upon which the Sheriff-substitute was entitled to take evidence and afterwards form his opinion, which opinion is final.

LORD YOUNG.—The material facts stated by the Sheriff-substitute are that the appellant sold as sweet milk an article which, though consisting wholly of pure milk, contained 2·2 per cent., and no more, of fat; that the two chemists examined as witnesses differed in opinion on the question, whether or not some addition of skimmed milk or some abstraction of cream was thence to be inferred; that in ‘consequence of the difference in opinion,’ and on the motion of the prosecutor, the Sheriff-substitute ordered a sample of the milk to be sent to Somerset House for analysis, and obtained a certificate of analysis, on considering which he pronounced the conviction complained of.

1884.

No. 52.

Dargie

v.

Dunbar

High Court,  
March 18.

Appeal.

1884.

No. 52.

Dargie

v.

Dunbar.

High Court,  
March 18.

Appeal.

The Sheriff-substitute of course considered the whole evidence, but it is manifest that his judgment was determined by an opinion expressed in the Somerset House certificate as deduced from the analysis. The analysis of the London analyst does not differ from that of their Scotch brethren, except in being slightly more favourable to the appellant, inasmuch as it exhibited 1 per cent. more fat. And, indeed, as the Scotch analysts substantially agreed on their analysis, it does not occur to me why a third analysis should have been ordered. The point of difference between them was whether the milk of Tarbrax cows necessarily contained more than 2·2 per cent. of fat; and if it was thought proper to ascertain this with certainty, I should have thought a reference to the cows, which were at hand, more satisfactory than a reference to London chemists.

Mr Macdougald was of opinion that no Tarbrax cow could yield milk containing less than 2·4 per cent of fat. Dr Stevenson Macadam thought that it could, and probably did, that being in his opinion a 'considerably to high average.' Now I cannot think this was a question to refer to Somerset House, or that it was legitimate to proceed, not on the analysis of the English chemists, but on their opinion that a Dundee (Tarbrax) cow must yield milk containing 2·4 per cent. of fat, for that is the meaning of the opinion that the milk in question, which was found to contain only 2·2 per cent., had been deprived somehow of the difference after it was got from the cow.

The case does not state any question of law for our consideration, unless it be whether there was evidence that could in any reasonable view of it support the conviction, which is generally an unsatisfactory way of stating a legal question, although, perhaps, sometimes unavoidable. But the questions intended to be put, as I suppose, were—(1st) Whether the Sheriff-substitute did right in referring the difference of opinion between Mr Macdougall and Dr Stevenson Macadam, not on a ques

tion of analysis, but of the necessary richness of sweet milk from Dundee cows, to the Somerset House chemists ; and (2d) Whether any milk with less than 2·4 per cent. of fat must, in point of law, in deference to the Somerset House standard, be pronounced to be not of the nature, substance, and quality of sweet milk, and that a sale of it by that name is, in point of law, necessarily to the prejudice of the purchaser. I am disposed to answer both of these questions in the negative, and so to quash the conviction.

LORD CRAIGHILL.—The appellant complains of a conviction obtained against her in the Sheriff Court at Dundee, on a complaint by the Procurator-Fiscal of Court, charging her with a contravention of the 6th section of the Sale of Food and Drugs Act, 1875, as amended by the relative Act of 1879. The question which the Sheriff had to try was—Whether the milk sold to the inspector and the sanitary officer on the day libelled as sweet milk, was not of the nature, substance, and quality of the article demanded, the same being, as alleged, deficient in fat, to the prejudice of these purchasers? And what is asked in the special case upon which parties come before this Court is—Whether on the facts stated by the Sheriff-substitute he was justified in convicting the appellant? The latter does not appear to me to be such a question as can competently be presented on appeal for our consideration. Under the Summary Prosecution Appeals (Scotland) Act, 1875 (38 & 39 Vic., c. 62), section 3, only a determination, said to be erroneous in point of law, may be the subject of the appeal provided for by that statute. But in the question now submitted to this Court there is no law on which the opinion of the Court is required, or on which, so far as I see, judgment can be given. None of the evidence received has been objected to as inadmissible, and it cannot reasonably be said that what has been adduced was legally insufficient to warrant a conviction. The issue was simply one of fact; and if the

1884.

---

 No. 52.  
 Dargie  
 v.  
 Dunbar.

---

 High Court,  
 March 18.

---

 Appeal.



1884.

No. 52.  
Dargie

v.

Dunbar.

High Court,  
March 18.

Appeal.

proof, such as it was, led the inferior Judge to the conclusion that the complaint had been established, his determination to this effect may not be impugned on an appeal, or by any other procedure in this or in any other Court of review. The counsel for the appellant, indeed, endeavoured to show that the assumption of the Somerset House standard as a test for trying the quality of the milk was an error in point of law, but this is a mistake according to my view of the matter. That was resorted to by the Sheriff-substitute not in deference to any supposed legal rule by which the question at issue behoved to be tried, but partly in consequence of evidence adduced on the subject, and partly out of consideration for the relative provision in section 22 of the first of the two statutes libelled on in the complaint. This objection, therefore, appears to me to be unfounded. The conviction was also said to be unwarranted in point of law, inasmuch as prejudice to the purchaser had not been established, evidence, indeed, not having been led upon that subject. But in dealing with this objection it must be remembered, in the first place, that the Act of 1875, upon which judgment was given in the case of *Davidson v. Macleod*, High Court, 14th December 1877, Couper, vol. iii. p. 511, has been amended; and that a purchase by a public officer for analysis is on the matter of prejudice the same thing as a purchase by any other of the lieges. And, in the second place, that if the thing sold be of a quality inferior to that demanded, there must be prejudice to the purchaser if inferior quality be not made up by superior quantity. No case of this kind was suggested on the part of the appellant, much less is there proof which would have supported such a case had it been presented. The conviction, therefore, cannot, in my opinion, be successfully impeached on the ground now under consideration. For these reasons it appears to me that cause has not been shown for this appeal, and that as a consequence it ought to be dismissed.

But if the question presented to us in the special Case were to be taken up for judgment, which, in my opinion, it ought not to be, for the reasons already expressed, I should say without any hesitation that the proof justified the conviction. The Sheriff possibly, as there was conflict between the experts, might, without incurring imputation of error, have held the charge not proven. But from this it may not be inferred that the judgment he gave was erroneous, or in the circumstances unwarranted. Mr Macdougald, the public analyst for Dundee, no doubt, differed in opinion from Dr Stevenson Macadam, who was a witness for the appellant, as to the quality of the milk, and as to the standard by which that was to be judged. And it was because of this conflict that the Sheriff, availing himself of the power conferred by the 22d section of the Act of 1875, ordered a third sealed bottle to be transmitted to the Commissioners of Inland Revenue for analysis by the chemical officer of that department at Somerset House. These experts, thus consulted, returned a certificate in which they say that from a consideration of the ascertained results, they formed the opinion that the milk had been deprived of a portion of its fat. The evidence of Mr Macdougald receiving such a corroboration, the balance of proof might reasonably be taken to be in favour of the conclusion to which effect was given by the Sheriff when he convicted the appellant.

But even were this view of the matter to be taken as correct, the appellant's counsel argue, that nevertheless the conviction should be quashed because the milk had been tampered with only to a small extent. This, assuming the fact to be as represented, may be a reason for modifying the penalty, but is not a reason for setting aside the conviction. If the thing complained of was such as was worth doing for profit, it was such as might properly be made the subject of a prosecution; and the result arrived at cannot reasonably be impeached upon a plea which requires that the guilty shall be dealt

1884.

---

No. 52.  
Dargie  
v.  
Dunbar.

---

High Court  
March 18.

---

Appeal.

1884.

No. 52.  
Dargie  
v.  
Dunbar.

High Court,  
March 18.

Appeal.

with as if he were innocent of the offence laid to his charge. The Act of 1875 was passed for the protection of the public, and the public would not be protected—on the contrary, transgressors would be encouraged—were a plea like this to be countenanced by the Court.

On the whole matter my opinion is that this appeal ought to be dismissed.

The LORD JUSTICE-CLERK concurred with Lord Young.

The following was the Interlocutor :—

‘*Edinburgh, 18th March 1884.*—Having considered this Case and heard counsel for the parties, Reverse the determination of the inferior Judge : Find the appellant entitled to expenses, which modify to seven guineas, for which, and one guinea as the dues of extract, decern against the respondent.’

Agents for the Appellant—MESSRS PHILIP, LAING, & TRAIL.

Agents for the Respondent—MESSRS STUART & STUART, W.S.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY, Appellants—  
*Trayner—R. V. Campbell.*

AGAINST

MRS MARY HUTCHISON AND OTHERS (ROBERT HUTCHISON’S TRUSTEES),  
Respondents—*Mackintosh and Goudy.*

RAILWAY — STREETS, INTERFERENCE WITH — CLOSING TRAFFIC OF  
STREETS—STATUTE 45 and 46 VIC., C. CCXVI., SEC. 39 (The Glasgow  
City and District Railway Act, 1882)—RAILWAY PRIVATE ACT.—  
An Act of Parliament, which empowered a company to make under-  
ground railways within a town, and for the purposes of their under-  
taking to interfere with the streets, enacted that ‘in constructing  
the railways the company shall restore the portions of carriage-  
way of any street to be from time to time closed by them for traffic  
for the purposes of the works, within three months from the day  
upon which such portions shall respectively be so closed, and they  
shall be liable to a penalty not exceeding £20 for every day after  
the expiration of the said period during which such portions re-

spectively shall not be so restored.'—Held that under this enactment the company were liable in the penalty if they did not within three months restore portions of the street used by them for the purposes of their works, although these portions did not include the whole breadth of the carriageway, but left a sufficient space to allow carriage and cart traffic to pass.

PEAL—STATUTE 38 and 39 VIC., c. 62, sec. 3 (Summary Prosecution Appeals Act, 1875).—STATUTES 27 and 28 VIC., c. 53, and 44 and 45 VIC., c. 33 (Summary Jurisdiction Acts, 1864 and 1881)—

PENALTY, MODIFICATION OF.—A private Act of Parliament authorising the construction of an underground railway, directed that a penalty not exceeding £20 per day, to be imposed on the railway company for the interference with the carriageway of the streets beyond a fixed period, should 'be recoverable with costs in the Court of the Sheriff of the county of Lanark on *summary application* by all or any of the proprietors or tenants in that part of the street' which was opposite the portion which had not been restored within the fixed period.

an appeal on a Case stated under the Summary Prosecutions Appeals Act, 1875, against a judgment of the Sheriff under the Summary Jurisdiction Acts, 1864 and 1881, convicting the Company of a contravention of their Act, the appellants objected to the competency of recovering the penalties provided by way of complaint under the Summary Jurisdiction Acts, in respect that they were not penalties in the sense of these Acts, which were not capable of being applied to incorporations, as incorporations could not suffer imprisonment—the proper remedy being a summary application in the Ordinary Sheriff Court. The Court dismissed the appeal.

nions as to whether the Court of Justiciary has power in a Case stated for its opinion under sec. 3 of the Summary Prosecutions Appeals Act of 1875, to modify the penalty imposed by the inferior Judge.

This was an appeal on a Case stated under the Summary Prosecutions Appeals Act, 1875, against a judgment of one of the Sheriff-substitutes for Lanarkshire (W. Guthrie, Advocate), convicting the appellants, the Glasgow City and District Railway Company, on a complaint under the Summary Jurisdiction Acts, 1864 and 1881, charging a contravention of section 39 of the Glasgow City and District Railway Act, 1882.<sup>1</sup>

1884.

No. 53.

The Glasgow City and District Railway Company

v.  
Hutchison and Others.

High Court,  
March 20,

Appeal.

<sup>1</sup> Statute 45 and 46 VIC., c. CCXVI. (The Glasgow City and District Railway Act, 1882).

1884. The Case stated by the Sheriff set forth :—

No. 53.  
The Glasgow  
City and Dis-  
trict Railway  
Company

v.  
Hutchison  
and Others.

High Court,  
March 20.

Appeal.

‘That the respondents are proprietors of the property forming Nos. 227, 229, 231, 233, 235, and 237 West Regent Street, and Nos. 128, 130, and 132 Holland Street, Glasgow.

‘That in or about the month of May 1883, or at all events prior to the first day of June in that year, the appellants, in constructing the railway presently being constructed by them from the Stobcross branch of the North British Railway to the Glasgow and Coatbridge branch of the same, and for the purposes of the said work, closed for traffic a portion of the carriage way of Holland Street opposite to the property above mentioned belonging to the respondents. That by the 39th section of the Act 45 and 46 Victoria, chapter ccxvi., being the Act by which the appellants are empowered to make the said railway, it is provided :—[Quotes. See foot-note, p. 423.] That the appellants have failed to restore the said portion of the carriageway of Holland Street, as required by the said section, and in terms thereof they are liable to the respondents in a penalty not exceeding £20

---

Section 34.—‘Subject to the provisions of this Act the company may, for the purpose of constructing railway No. 1, appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and places shewn on the deposited plans, and described in the deposited books of reference ; and may break up, remove, alter, or interfere with all drains or sewers, and all water, gas, and other pipes therein or thereunder ; and the company may, during the construction of the railways, cross, alter, stop up, or divert the said streets, roads, roadways, lanes, footpaths and places, or any of them, and use and appropriate any of them so stopped up,’ &c.

Section 37.—‘For the further protection of the Lord Provost, Magistrates, and Council of the city of Glasgow, . . .—(in this section called “the corporation”) — the following provisions . . . shall have effect, and be binding on the company (that is to say) :—

‘(a) At least twenty-one days before the company commence any works, the execution of which could in any way interfere with or affect any of the roads or streets in the city and royal burgh of Glasgow, or which would interfere with or affect the sewers and drains belonging to the corporation, the company shall give to the corporation notice thereof in writing, accompanied by plans, sections, working drawings, and specifications shewing the manner in which the proposed railways and works are to be executed, and also the means to be employed for protecting the said roads, streets, sewers, and drains during the operations of the company, and also the means to be employed for making good any injury or damage to or interference with the said roads, streets, sewers, and drains ; which plans, sections, working drawings, and specifications shall be subject to the approval

per day for every day after the expiration of the period of three months from and after the 1st day of June 1883, during which the said portion of the carriageway is not restored; and the complaint therefore craves the Sheriff to grant warrant to cite the said appellants to appear before him to answer to said complaint, and thereafter to convict them of the aforesaid contravention, and to adjudge them to pay to the respondents the penalty provided by the said Act.

'In order to understand one of the preliminary pleas taken by the appellants, it is necessary to state that an ordinary action (in the form provided by the Act 39 and 40 Vict., cap. 70, sec. 6) brought before me by the respondents against the appellants for the same penalties had been dismissed by me, without expenses, on the 2d day of January 1884, on the ground that said section 39, imposing the penalties, having authorised the recovery thereof by 'summary application,' the provisions of the 3d section of the Summary Jurisdiction (Scotland) Act, 1881, applied to them, and it became obligatory to use the only forms for the summary recovery of penalties now lawful in the Sheriff court, viz., the forms of the Summary Jurisdiction (Scotland) Acts,

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Hutchison  
and Others.High Court,  
March 20.

Appeal.

the corporation previously to the works of the company affecting the said roads, streets, sewers, or drains being commenced.

'(b) Where the railways and works and operations of the company are carried on upon the surface of the ground, the company shall not at any one time, without the consent of the corporation, interfere with or occupy, for the purposes of the said railways and works and operations, a greater extent of road or street surface than one hundred and fifty lineal yards. In every case in which the company interfere with said road or streets, the company shall, to the satisfaction of the corporation (1) restore the road or street so interfered with to its original level; (2) cause the formation of the road or street to be properly consolidated; (3) make good the paving and metalling of the road or street; (4) provide and maintain all requisite communications and accesses for foot-passengers to and from the houses and other buildings in the streets or roads so interfered with.'

Section 39.—'In constructing the railways the company shall restore the portions of the carriageway of any street to be from time to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed, and they shall be liable to a penalty not exceeding £20 for every day after the expiration of the said period during which such portions respectively shall not be so restored, and such penalty shall be recoverable with costs in the Court of the Sheriff of the County of Lanark, on summary application by all or any of the proprietors, or tenants, in that part of the street which is opposite the respective portions which shall not be restored.'



1884.  
 No. 53.  
 The Glasgow  
 City and Dis-  
 trict Railway  
 Company  
 v.  
 Hutchison  
 and Others.  
 High Court,  
 March 20.  
 Appeal.

1864 and 1881.<sup>1</sup> At the date of stating the preliminary objections in the present case, viz., on 16th January 1884, the said judgment of dismissal was not extracted, and it was liable to be appealed against, but up to the present date it has neither been appealed against nor extracted. When the present cause came up before me on 16th January 1884, Mr Robert Peel Lamond, law agent, appeared for the appellants, and stated the following preliminary objections :—

<sup>1</sup> Statute 27 and 28 Vic., cap. 53 (Summary Procedure Act, 1864).

Sec. 2—‘ . . . “Penalty” shall mean any sum of money which may, under the authority of any Act of Parliament, be recoverable from any person in respect of the contravention of any statutory requirement or prohibition, and also any sum which may under the provisions of any Act of Parliament, be recoverable as a penalty of forfeiture, whether such sum shall be payable to the party complaining, prosecuting, or suing for the same, or shall be payable in whole or in part to any other person, or be applicable to any other use, and whether the amount thereof is fixed by such statutory provision, or is so fixed subject to a power to modify or mitigate, or is in the nature of a penalty not exceeding a certain sum, to be awarded by the court or judge who may take cognizance thereof.

Section 3.—‘The provisions of this Act may be applied to—

‘(1.) All proceedings before any sheriff, justices or justice, or magistrate in Scotland in virtue of the summary jurisdiction conferred upon them, or any of them, in relation to the trial of offences and recovery of penalties, by the recited Acts, or any of them.

‘(2.) All proceedings to be taken before any sheriff, justices or justice, or magistrate in Scotland for the prosecution of any person who has committed, or is charged with having committed, any offence or act for which, under the provisions of any Act of Parliament, he is liable, upon summary conviction before any sheriff, magistrate, justices or justice, to be imprisoned or fined, or otherwise punished, or to be ordered to do or perform any act, and to be imprisoned in default of performance.

‘(3.) All proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament, may be recovered by summary complaint or information, or by poinding or distress and sale, or other summary process or diligence of the like nature, before any sheriff, justices or justice, or magistrate.

‘(4.) All proceedings for the trial or prosecution for any offence, or for the recovery of any penalty, under any Act of Parliament by which it shall be provided that offences committed in contravention thereof or penalties thereby imposed shall be prosecuted or recovered under the provisions of this Act.

Schedule K. No. 6.—‘*Judgment for a Penalty recoverable by Dili-*



“ 1. *Lis pendens*, in respect that the appealing days against the sheriff-substitute's interlocutor of 2d January current dismissing an ordinary action for the same penalties by the complainers (the respondents) against the respondents (the appellants) are not yet expired. 2. That it is incompetent to sue for the penalties imposed by section 39 of the respondents' (the appellants') special Act, 45 and 5 Vic., cap. cxxvi., in the forms prescribed by the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, but that the same should be sued for by summary application to the Sheriff's ordinary jurisdiction, as prescribed by the Act of Sederunt, 10th July 1839, and recognised

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Hutchison  
and Others.High Court,  
March 20.

Appeal.

*ence*.—The justices [*or justice, or sheriff, or magistrate*], in respect of the judicial confession of the said *J. K.* [*or of the evidence adduced*], convict the said *J. K.* of the contravention [*or offence*] charged [*or state to what extent he is guilty*], and therefore adjudge him to forfeit and pay the sum of £        of penalty [*or modified penalty, where there is power to modify*], of £       , and also find the said *J. K.* liable in £        of expenses to the complainer, and ordain instant execution by arrestment, and also execution by poinding [and imprisonment, *where there is power to imprison*]; grant warrant to officers of court to arrest all debts and sums of money owing to the said *J. K.*, and [*if time is allowed, add, in default of payment within*        days from this date] to poind his goods and effects and to sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant; [*where the Act authorises imprisonment, add*], and appoint a return or execution of such poinding and sale to be made within        days from the expiration of the period hereby allowed for payment, under certification of imprisonment [*if for a term specify the term*], in default of payment or recovery of the said sums with the expenses of diligence before the time allowed for such report.—[*Signature of judges or judge.*]

Statute 44 and 45 Vic., cap. 33 (Summary Jurisdiction Act, 1881).

Section 8.—‘(1.) *Imprisonment competent in default of recovery by poinding*.—Subject to the provisions of section six, in all proceedings under the Summary Jurisdiction Acts where a warrant of poinding and sale is competent, a warrant of imprisonment in default of recovery of sufficient goods shall likewise be competent for a period not exceeding three months, and the court shall specify the term of imprisonment in the warrant.

‘(2.) *Execution of warrants of poinding and sale*.—All warrants of poinding and sale under the Summary Jurisdiction Acts shall be executed in manner provided by the Small Debt Act, 1837 [7 Will. 4 and 1 Vict., cap. 41], provided that, in place of the customary notice of sale, notice of every sale under such warrants shall be given by advertisement in some newspaper circulating in the place of sale on the day of sale or within three days preceding the same.’

1884. by sec. 147 of the Railway Clauses Consolidation (Scotland) Act,  
 No. 53. 1845. 3. Defect of jurisdiction by reason of such incompetency, and  
 The Glasgow 4. Irrelevancy, in respect there is no statement averring damage."  
 City and Dis- 'I repelled said objections. Mr Lamond thereupon pleaded, on  
 trict Railway Company behalf of the appellants, and under reservation of said objections, and  
 v. Hutchison under protest, not guilty.  
 and Others. 'The cause was adjourned for trial to the 22d January 1884. On  
 High Court, that date the following admissions were made by joint minute of the  
 March 20. parties, which minute and relative sketch were put in, and formed  
 Appeal. the sole evidence in the cause :—

"That the complainers (the respondents), as trustees of the deceased Robert Hutchison, are proprietors of the property in West Regent Street and Holland Street mentioned in the complaint.

"That the portion of the carriageway of Holland Street enclosed by the respondents (the appellants) is partly opposite the complainers' (the respondents') property mentioned in the complaint, and that it extends beyond the centre line of said street, and on to the half thereof embraced in the complainers' (the respondents') title, leaving a passage about twelve feet wide between it and the edge of the foot-path on the complainers' (the respondents') side of the street open for vehicles and other street traffic. That the said enclosure and its situation relative to Holland Street is fairly represented on the hand sketch signed as relative hereto. That the said enclosure has existed since 1st June 1883, and still exists. That the complainers (the respondents) are non-resident in the property mentioned in the complaint, and that they have not sustained any personal inconvenience by the existence of the said enclosure." The sketch above mentioned is here referred to, and held as forming part of this case.

'On the 28th January 1884, to which date the cause had been further adjourned, I, in respect of the evidence adduced, viz., the said facts admitted, convicted the appellants of the contravention charged, and therefore adjudged them to forfeit and pay the sum of £256 of modified penalty, one half thereof to be paid to the present respondents (the complainers), and the other half thereof to be paid to the inspector of poor of the Barony Parish, Glasgow, for the benefit of the poor of such parish, and also found the appellants liable in £3 of expenses to the respondents, and ordained instant execution by arrestment, and also execution by poinding, granted warrant to officers of Court to arrest all debts and sums of money owing to the appellants, and to poind their goods and effects, and to sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant. In fixing said penalty, I gave at the rate of £2 per day for the period beyond the three months up to the date of the action. In appropriating the penalty, I had regard to the provisions of the Railway Clauses Consolidation (Scotland) Act 1845, and especially section 142 thereof.'

The questions of law were—

1. Whether, in the circumstances stated, the plea of *lis pendens* was well founded, and should have received effect? 2. Whether it was competent to bring the cause under the provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881? 3. Whether the fact that the party complained against was an incorporation rendered the application of the Summary Jurisdiction Acts impracticable or illegal? 4. Whether, under the provisions of section 39 of the special Act founded on, it was necessary, before the appellants could incur the penalty therein specified, that for a greater period than three months they should occupy the carriageway of the street opposite the respondents' property to such a breadth or extent as would *entirely prevent* carriage traffic from passing that point; or whether it was sufficient to render the appellants liable in the penalty that they, as in the present case, for a period exceeding three months occupied somewhat more than half of the breadth of the carriageway of the street there, while leaving clear a part of the carriageway 12 feet wide, next the property of the respondents, for vehicle and other traffic, besides the footpath? 5. There being no statement in the complaint averring damage to the respondents, whether the complaint was relevant? 6. Whether the penalty awarded, if legally incurred, has been properly bestowed or appropriated? 7. Whether, in the whole circumstances of the case, the conviction and judgment or sentence in question are well founded, and should stand?

1884.

No. 53.  
The Glasgow  
City and Dis-  
trict Railway  
Company

v.  
Hutchison  
and Others.

High Court,  
March 20.

Appeal.

R. V. CAMPBELL for the appellants.—This is an appeal against a conviction by one of the Sheriff-Substitutes of Lanarkshire at Glasgow, finding the appellants, the Glasgow City and District Railway Company, guilty of a contravention of sec. 39 of their Act, which provides:—[reads, see footnote p. 423]. Our construction of this section is, that we must have obstructed the whole breadth of the street in order to incur the

1884. penalty, and that the only check provided by the Act  
 No. 53. prevent us from obstructing unduly any smaller p  
 The Glasgow tion—in breadth—of any street is, that we must obt  
 City and Dis- the consent of the magistrates under sec. 37 of o  
 trict Railway Company  
 v. Hutchison Act. The obstruction complained of began in Ju  
 and Others. 1883, and it consists of a hoarding filling up abo  
 High Court, half the carriageway of the street—at least, about 1  
 March 20. feet is left free for traffic. A shaft has been construct  
 Appeal. at this point (which is nearly in the centre of t  
 operations carried on by the railway company) for t  
 purpose of conveying bricks and other materials to t  
 workings below. If this shaft and hoarding are with  
 the Act, it is obvious that the decision of this prosecuti  
 involves very large sums indeed, for it has been open,  
 has been said, from June 1883, and must necessari  
 remain open for a considerable time longer if the railwa  
 is to be completed; and the penalty under the Act  
 £20 per day. Besides, similar questions will arise  
 other parts of the city where the Company's line is t  
 extend, and with similar penalties. But the fir  
 question relates to the competency of bringing thi  
 prosecution for penalties under the Summary Jurisdiction  
 Acts, 1864 and 1881. We object to that being done  
 The three months allowed by the 39th section of th  
 Railway Act expired on 1st August, so that the penaltie  
 already incurred for this single shaft exceed £2000; and  
 if this prosecution has been competently brought, then  
 we are, in a question involving a sum like that, exclude  
 even from review by the Sheriff, not to mention the  
 Court of Session and the House of Lords, our only  
 redress being by way of a Case stated on a question o  
 law under the Summary Prosecutions Appeals Act, 1875  
 Section 39 of our special Act provides that 'such penalt  
 shall be recoverable with costs in the Court of th  
 Sheriff of the County of Lanark on summary application.  
 That means one of the ordinary forms of summar  
 application to the Sheriff in his ordinary jurisdiction  
 such as is prescribed by the Act of Sederunt of 10<sup>th</sup>

July 1839, sec. 145, and is recognised by the Railway  
 Clauses Consolidation (Scotland) Act, 1845 (8 and 9  
 Vic., cap. 33), sec. 147,—as indeed appears to have been  
 the view of the respondents when they made their first  
 application. Summary causes in the ordinary Sheriff-  
 Court do not differ in point of form from causes which  
 are not summary, only they are heard out of the ordin-  
 ary course, just like cases in the Summar Roll in the  
 Court of Session. The error into which the Sheriff-  
 Substitute has fallen in interpreting the provision of  
 sec. 39 of the special Act is, that he has disregarded the  
 fact of there being another form of summary application  
 in the Sheriff-Court besides that prescribed by the Acts  
 of 1864 and 1881. Summary applications in the ordinary  
 Sheriff-Court have not been abolished with the recent  
 changes in Sheriff-Court procedure. Such applications,  
 on the contrary, are recognised by the Sheriff-Court Act  
 of 1853 (16 and 17 Vict., cap. 80), sec. 44, and by the  
 Sheriff-Courts Act, 1876 (39 and 40 Vict., cap. 70), sec.  
 52 ; and sec. 27 of the Summary Procedure Act, 1864,  
 expressly saves all ordinary Sheriff-Court forms. The  
 Sheriff-Substitute has grounded his judgment on section  
 3 of the Summary Jurisdiction Act of 1881, which enacts  
 that the provisions of the Summary Jurisdiction Acts of  
 1864 and 1881 ‘shall apply to all summary proceed-  
 ings as enumerated and described in the 3d section of  
 the Summary Procedure Act of 1864, and to all pro-  
 ceedings of a like nature which by any future Act are  
 directed to be taken summarily.’ The Sheriff-Substi-  
 tute thinks that the proceedings contemplated by  
 section 39 of our special Act is a proceeding of ‘a like  
 nature’ with those enumerated in sec. 3 of the Act of  
 1864. We maintain that that is a mistake. The  
 penalty provided by section 39 is not of the nature of a  
 penalty for a crime ; what that section contemplates is  
 the recovery of a sum by way of civil damages. This is  
 the first attempt in Scotland, so far as we know, to pro-  
 secute a corporation criminally or *quasi*-criminally. In

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
CompanyHutchison  
and Others.High Court,  
March 20.

Appeal.

1884. England there is not much authority on the point, but  
 No. 53. there the current doctrine seems to be that while the  
 The Glasgow word 'person' includes jural as well as natural persons,  
 City and Dis- yet when it is used with reference to an offender by  
 trict Railway Company whom some delinquency has been or may be committed,  
 v. it can be held to include physical persons only. See  
 Hutchison *Guardians of St Leonards v. Franklin*, June 28, 1878,  
 and Others. L.R. 3 C.P. Div. 377, per Lord Chief-Justice Coleridge  
 High Court, at p. 380; Maxwell on Statutes, 2d edit. p. 75. The  
 March 20. word is to be construed *secundum subjectam materiam*.  
 Appeal. And it is quite plain that the Summary Jurisdiction  
 Acts contemplate persons who can be brought before a  
 judge, can plead guilty and can suffer imprisonment.  
 Section 8 of the Act of 1881, and the forms of warrants  
 attached to the Acts, make that quite plain; and that  
 must have been the view of the parties here, for the  
 company (through its agent) is made to 'plead guilty.'  
 But while it may plead guilty through its agent, it is  
 hard to imagine that it could undergo imprisonment in  
 that vicarious fashion. In short, the idea of prosecuting  
 and imprisoning a corporation is absurd, and conse-  
 quently the Summary Jurisdiction Acts are not applic-  
 able to the recovery of penalties under section 39 of the  
 special Act. Passing now to the merits of the case—

LORD JUSTICE-CLERK.—We will hear this point argued  
 from the other side before you proceed to the merits.

GOUDY for the respondents.—It is difficult to see  
 what benefits the appellants can gain by having their  
 objection sustained. They say they get a right of  
 appeal to the Court of Session and the House of Lords,  
 instead of merely an appeal on a Case stated to the  
 Court of Justiciary. But if they come, as they say they  
 do, under the Railway Clauses Act of 1845, the judg-  
 ment of the Sheriff under that act is final—see sec. 150  
 —so that they have not even the right of having a Case  
 stated. We say, however, that looking to terms of the  
 39th section of the special Act, and of the various  
 provisions of the Summary Jurisdiction Acts, 1864 and



1881, the present complaint is a perfectly competent form of procedure, whether or not another form may not have been equally competent. The Summary Jurisdiction Acts do not relate to criminal proceedings only. The definition of 'penalty' in the Act of 1864 is:— [reads sec. 2, footnote p. 424]. The penalty provided by the special Act, sec. 39, is quite within that definition. The only real difficulty arises from the 8th section of the Act of 1881, taken along with form No. 6 in Schedule K. of the Act of 1864 [see footnote p. 424], which is the form of judgment adopted by the Sheriff. That seems to render imprisonment possible under such a judgment, and we do not maintain that a corporation can be imprisoned. But it does not follow that it cannot incur penalties, which are to be recovered according to the nature of the delinquent. In short, there are cases to which the Acts of 1864 and 1881 apply with perfect propriety, in which, nevertheless, imprisonment is impossible. That may either be from personal privilege, as in the case of peers, or from personal incapacity, as in the case of married women, or as in the present case, from the merely jural nature of the person. The Bankruptcy Act offers a very appropriate analogy, for it contains provisions for the personal protection of the bankrupt, and it is well settled that corporations may be made notour bankrupts. Railway companies are also liable for breach of interdict, *Hamilton v. Caledonian Railway*, July 20, 1847, X. D. 41, 19 Scot. Jur. 693, rev. Aug. 3, 1850, VII. Bell's App. 272, 22 Scot. Jur. 622. It is quite possible that the Sheriff-Substitute was in error in dismissing the original application in the ordinary Sheriff-Court form, for both forms may be competent.

TRAYNER for the appellants.—This question depends primarily on the words of sec. 39 of the special Act. What that Act provides is twofold, that the penalty shall be recoverable in the Sheriff-Court of Lanarkshire, and that it shall be recoverable on summary application.

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Hutchison  
and Others.High Court,  
March 20.

Appeal.



1884. There are no other limitations. There is nothing in particular to suggest the exclusion of the ordinary rights of appeal. It may be very proper that cases like the present should be heard expeditiously ; but a less suitable tribunal for determining the very large interests at stake here than the Sheriff sitting under the Summary Jurisdiction Acts, could hardly be devised. Therefore that form of summary application is not to be assumed as the one which the Legislature intended ; and what the Legislature did intend is easily discoverable from its language, for the Act says the Sheriff-Court of Lanarkshire ; and when an Act of Parliament mentions a well-known jurisdiction, that, in the absence of strong words to the contrary, must be held to mean the jurisdiction with its ordinary procedure and ordinary rights of appeal. *Magistrates of Portobello v. Magistrates of Edinburgh*, Nov. 9, 1882, x. R. p. 130, per Lord Justice-Clerk at p. 137. To hold that both forms are open, would be to give the complainer the right of saying whether there was to be an appeal or not.

No. 53.  
The Glasgow  
City and Dis-  
trict Railway  
Company  
v.  
Hutchison  
and Others.  
High Court,  
March 20.  
Appeal.

Parties were then heard on the merits.

R. V. CAMPBELL and TRAYNER for the appellants.—The question is whether total obstruction is necessary in order that the penalties under sec. 39 of the special Act may be incurred. We say that it is—that the ‘portions of the carriageway . . . closed for traffic’ dealt with in sec. 39 are the portions contemplated in sec. 37 (b), of 150 yards in length, and of the whole breadth of the carriageway, or, at least, of so much of the breadth as would prevent carriage and cart traffic from passing. Where we interfere with any smaller breadth of the carriageway, the only limitation on our absolute right under sec. 34 is the necessity of obtaining the approval of the magistrates under sec. 37 (a). That is plain from subsection 4 of sec. 37 (b) ; but even if it were not, *in dubio* the construction which is against the imposition of a penalty is to be preferred, particularly here, where the other construction involves liability for a pen-

alty of £20 per day, when a small portion of the street is occupied for more than three months, no matter how little inconvenience it may cause to the residents and how essential it may be to our undertaking. If the conviction is to stand our very existence is threatened.

MACKINTOSH and GOUDY for the respondents.—The Act does not contemplate the protection of the through traffic only; it has in view the convenience of the residents—primarily even—for they are the parties at whose instance proceedings are to be taken. Section 37 (b) is not limited to cases in which the carriageway is closed from side to side. The words are ‘interfere with’ as well as ‘occupy,’ and you may interfere with the whole breadth though you do not occupy it.

At advising,—

LORD YOUNG.—This case arises out of operations undertaken by the appellants in the course of making the Glasgow City and District Railway, under an Act of Parliament which they obtained in 1882. The railway authorised by that Act is such that, in the construction of it, it is necessary to interfere with the streets, not only underground (for it is an underground railway), but on the surface. Accordingly, not only is authority given to the railway company to do so, but very precise, defining, and limiting provisions are contained in the statute in regard to that matter. The most important of these limitations with reference to the present questions is that contained in the 39th clause of the statute, which provides that, in constructing the railway, the company shall restore the portions of the carriageway of any street to be from time to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed, and shall be liable to a penalty of so much for each day beyond the three months during which the restoration is delayed. Now, the Sheriff has found, in point of fact, here, that in or about the month of May 1883, or, at all events, prior to the 1st of June of that

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
CompanyHutchison  
and Others.High Court,  
March 20.

Appeal.

1884.  
 No. 53.  
 The Glasgow  
 City and Dis-  
 trict Railway  
 Company  
 v.  
 Hutchison  
 and Others.  
 High Court,  
 March 20.  
 Appeal.

year, the appellants, in constructing the railway at present being constructed by them from the Stobcross branch of the North British Railway to the Glasgow and Coatbridge branch of the same, closed for traffic a portion of the carriageway of Holland Street opposite the property above mentioned, belonging to the respondents (it is unnecessary to describe the property), and that the appellants have failed to restore the said portion of the carriageway of Holland Street as required by the said section—the section to which I have referred, and from which I have read—and, in terms thereof, that they are liable to the respondents in a penalty not exceeding £20 a-day ; and a penalty is consequently imposed. It appears that the street at the place in question is not entirely closed to traffic, but only about a half of its breadth, there being about twelve feet left open, which is sufficient to allow a carriage to pass. And the leading question put to us by the Sheriff is whether, under the provisions of section 39 of the special Act founded on, it is necessary, before the appellants could incur the penalty therein specified, that for a greater period than three months they should occupy the carriageway of the street opposite the respondents' property to such a breadth or extent as would entirely prevent carriage traffic from passing that point, or whether it is sufficient to render the appellants liable in damages that they, as in the present case, for a period exceeding three months, occupied somewhat more than half of the breadth of the carriageway of the street there, while leaving clear part of the carriageway, twelve feet wide, next the property of the respondents for vehicular and other traffic to pass.

Now, that question depends on the true construction and meaning of that clause—clause 39—taken in connection with clause 37, to which I shall immediately refer. I notice again the words of clause 39—that 'in constructing the railways, the company shall restore the portions of the carriageway of any street to be from

ime to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed, and they shall be liable to a penalty not exceeding £20 for every day after the expiration of the said period during which such portions respectively shall not be so restored; and such penalty shall be recoverable with costs in the Court of the Sheriff,' and so on. On the one side it was maintained that 'portions of the carriageway closed' really signifies what the words *prima facie* express, any portions of the carriageway closed for traffic, or used and occupied by the railway company—that, while that use and occupation continues, these portions are closed for traffic, although there may be other portions of the carriageway of the street quite available for traffic, so that it is not closed as by an obstruction from side to side, still there are portions closed by the use and occupation thereof by the railway company, and consequently, although that may continue for three months, yet it shall not continue thereafter, but that these portions shall then be restored to use for traffic, under the penalty provided by the statute. That is the view upon the one side, and it is the view avowed by the Sheriff-Substitute. On the other side the view presented has reference to clause 37; and I think I am not mistaken in understanding that subsection (b) is that which is relied on. The whole of clause 37

for the protection of the Corporation of Glasgow in the execution of the works authorised by the statute—that is, the construction of the railway under and upon the streets of Glasgow. Subsection (b), for the protection of the Corporation having charge of these streets, is in these terms,—'Where the railways and works and operations of the company are carried on upon the surface of the ground, the company shall not at any one time, without the consent of the Corporation, interfere with or occupy, for the purposes of the said railways and works and operations, a greater extent of road or

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Hutchison  
and OthersHigh Court  
March 20.

Appeal.

1884.  
 No. 53.  
 The Glasgow  
 City and Dis-  
 trict Railway  
 Company  
 v.  
 Hutchison  
 and Others.  
 High Court,  
 March 20  
 Appeal.

street surface than 150 lineal yards.' Before they occupy, they must submit their plans to the Corporation, and give them an opportunity of objecting—that is provided in another subsection of this same section 37. But it is here distinctly laid down that more than 150 yards of street shall not be occupied and used at once without the express permission of the Corporation. They may use and occupy the surface of the streets within the limit specified in the statute without any special consent of the Magistrates,—that is, to the extent of 150 yards. If they desire to occupy more than that at one time they must apply for and obtain the assent of the Corporation. Now, the contention on the part of the appellants—the railway company—is that 'the portions of the carriageway of any street closed for traffic,' referred to in clause 39, relate to portions which are entirely closed from side to side within the specified limits of 150 lineal yards in length; and that with regard to portions which are not so entirely closed, if the company can get the authority of the Corporation, they may keep them closed for any length of time without incurring any penalty.

Now, I am of opinion that the Sheriff's view is right, and that the other is untenable. Clause 37, subsection (b), imposes no restriction with respect to breadth—only length; the company are not to occupy more than 150 lineal yards of street at any one time. The expression is not quite accurate mathematically; that would signify length without any breadth; and that would be no street at all. But the meaning is plain enough. You are limited in length; you cannot occupy a length of street beyond 150 yards without the consent of the Magistrates. To that extent you may occupy the whole breadth or anything short of that, which your necessities require. But if you require more length you must go to the Corporation and get their leave. There is nothing here about breadth at all. And it is on the face of it, I think, an extravagant

opposition, that unless the company occupy the whole breadth of the street and close it up for carriage traffic for there is a provision for the footway being left open—there is no limitation on them at all; that they may occupy and close the carriageway to the extent of one-half or three-fourths of the breadth of the street without any limit in point of time. That is clearly untenable.

There is a limited power given to them to occupy the surface of the streets. The first limit is, You shall not, without the consent of the Magistrates, occupy the surface of any of the carriageways of the street beyond 50 yards in length: the second is, You shall not occupy and close for traffic any portion whatever of the carriageway of a street for a longer period than three months. That was, I suppose, assigned by the Legislature as the longest period that was reasonably necessary for the occupation of any portion of the carriageway in the execution of the works. At all events, it is the limit in the statute, and I cannot listen to the suggestion that it suits the convenience of the railway company to occupy and so close for traffic a very considerable portion of the carriageway of a street, because they wish to have a shaft led down there to their works which cannot be completed so as to admit of that shaft being closed within the three months. If they require shafts or anything else, for which the occupation of the surface of the ground for a longer period than three months is necessary, they must make them somewhere else than on the surface of the streets of Glasgow, for their power to occupy these streets and close them for traffic is limited to three months.

On this, the leading question in the case, I am of opinion that the Sheriff has taken a correct view of the statute, and that the railway company, having admittedly occupied a portion of the carriageway—the portion specified in the case—for a longer period than three months, are liable to the statutory penalty as the Sheriff has modified it.

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Company

v.  
Hutchison  
and Others.

High Court,  
March 20.

Appeal.

1884. That is the fourth and leading question. I may  
No. 53. notice the others very briefly. The first is, Whether, in  
The Glasgow the circumstances stated, the plea of *lis pendens* was  
City and Dis- well founded and should have received effect? I adhere  
trict Railway to the view that was thrown out in the course of the  
Company discussion, that the institution of this process implied  
v. an abandonment of the other.  
Hutchison  
and Others.  
High Court,  
March 20.

Appeal.

The second question is, Whether it was competent to bring the cause under the provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881? Now, this depends on the expression in clause 39—‘Such penalties shall be recoverable, with costs, in the Court of the Sheriff of the county of Lanark on summary application.’ Does that signify an application under the Summary Jurisdiction Acts, passed for the purpose of regulating summary applications to the Sheriff of the county? Upon the best consideration I have been able to give the matter, I am of opinion that these words entitle a party complaining of the proceedings of the company to make his application under these Acts, which regulate, and sensibly and conveniently regulate, summary procedure before the Sheriff for the recovery of penalties, and I think that, with reasonable safety to the legitimate interests of all parties, their procedure may be followed in this and in all similar cases. At all events, I think that such is the law. The Summary Jurisdiction Acts regulate the form of procedure under summary applications to the Sheriff for the recovery of penalties; and that is precisely what we have here.

The third question is, Whether the fact that the party complained against was an incorporation rendered the application of the Summary Jurisdiction Acts impracticable or illegal? Now, it is plain enough that a corporation cannot be imprisoned, and that, therefore, so much of the Summary Jurisdiction Acts as provides the remedy of imprisonment failing payment of penalty could not be rendered operative against them. But I



of opinion that that does not hinder the procedure  
g taken under the statute otherwise.

hen the fifth question—for the fourth is that which  
ave dealt with at the outset—is, There being no  
ement in the complaint averring damage to the  
ondents, whether the complaint is relevant? We  
really no argument upon that. And I am not sur-  
ed, for such a position is not tenable at all. The  
pose of the statute was to insure the restoration of  
streets within the period, and particular individuals  
not require to allege or prove any damage. The  
7 thing requiring to be established is, that the  
ipation and the stoppage of the traffic has been con-  
ied beyond the period allowed by the Act.

The sixth question is, Whether the penalty awarded,  
egally incurred, has been properly bestowed or ap-  
propriated? I cannot say that I have any opinion upon  
t, certainly none against what the Sheriff has done,  
no complaint or argument was stated to us on that  
ject, and therefore I do not interfere with the judg-  
at on that ground.

The seventh question runs, Whether, in the whole  
umstances of the case, the conviction and judgment  
sentence in question are well founded, and should  
id? That question seems to be put simply lest  
thing should have slipped through the meshes of the  
ers, and it does not need to be answered, the case  
ng disposed of by the answers to the previous  
stions.

My opinion on the whole is that this appeal—it is an  
eal upon a Case stated under the Summary Prosecu-  
is Appeals Act of 1875—ought to be refused.

LORD CRAIGHILL.—I concur in all points with the  
nion which has just been delivered. I only desire  
add with reference to the second question—that is,  
o the competency of bringing the action under the  
nmary Procedure statutes—that while I am of opinion  
has been properly brought, still I give no opinion that

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Hutchison  
and Others.High Court,  
March 20.

Appeal.

1884.  
 No. 53.  
 The Glasgow  
 City and Dis-  
 trict Railway  
 Company  
 v.  
 Hutchison  
 and Others.  
 High Court,  
 March 20.,  
 Appeal.

the original application in the Sheriff Court might not also have been competent. It does not appear to me that the competency of the one necessarily involves the incompetency of the other. That, however, is a question we do not require to decide; and all I say is, that I reserve my opinion until the time comes, if it ever comes, when that matter shall have to be decided.

LORD JUSTICE-CLERK.—I concur entirely on all the points Lord Young has gone over. In regard to the competency of bringing the case under the Summary Jurisdiction Acts, I do not think the opposite view is even plausibly stateable. The Summary Jurisdiction Acts appear to be Acts for the purpose of regulating procedure in criminal cases, and in prosecutions for penalties before the Sheriff Courts in Scotland. Therefore the notion of their not being applicable to prosecutions for penalties is, I apprehend, untenable. In addition to that, certainly there is nothing in the nature of an objection to the competency of this procedure, in the suggestion that it might have been brought under the ordinary summary jurisdiction of the Sheriff, and in the forms which were in use before the passing of the Summary Procedure Act, because the Summary Procedure Act expressly provides that nothing in that Act shall prevent such proceedings being brought according to the form at that time in use. I am therefore clearly of opinion that the case was well brought under the Summary Jurisdiction Acts.

I do not think it necessary to say anything upon the question whether the original proceeding might not have been sustained. We have not the decision of the Sheriff upon that matter before us.

On the merits also I think the case quite clear. Lord Young's commentary on the clauses under which the appellants acted seems to me perfectly sound, and quite in accordance with the expressions in the statute itself.

Your Lordships dismiss the appeal.

The respondents moved for expenses.

The appellants moved that the penalty as modified by the Sheriff-Substitute should be still further modified to the extent of one-half. The circumstances were such as made this course a reasonable one, the question of law raised being difficult, and there being no evidence that the respondents had suffered any damage by the company's operations. It was competent for the Court to modify penalties, under subsection 9 of section 3 of the Summary Prosecution Appeals Act of 1875 (38 and 39 Vic., cap. 61), at all events, where (as here) there was a competent appeal on proper questions of law, even although in the result the Court came to the conclusion that the Sheriff had not come to a wrong determination in law.

1884.

No. 53.

The Glasgow  
City and Dis-  
trict Railway  
CompanyHutchison  
and Others.High Court,  
March 20.

Appeal.

Argued for the respondents ;—The Court, under section 3 of the Summary Prosecutions Appeals Act, had no power to modify. The Court was not tied down to saying simply that the inferior Judge was right or wrong. Subsection 9 was intended to prevent that. The Court might vary the determination, but the variation must proceed on a finding that he had erred in law. In any event, no case for modification had been made out here.

LORD JUSTICE-CLERK.—It is quite true that the Summary Prosecutions Appeals Act of 1875 limits appeals to questions of law, but the powers given by the Act to the Court to deal with the determination of the inferior Judge seem to go beyond the mere matters of law submitted to them, and to give them power over the whole cause. My impression, however, is that we need not decide that matter in the present case. I do not see that any ground has been stated for interfering with the discretion of the Sheriff, who had the whole subject under discussion.

LORD YOUNG.—I do not think that we have power to modify the penalty.

LORD CRAIGHILL.—I concur with your Lordship in the chair. I do not say whether we have any power or

1884. not ; but if we have power, I, for one, would not exercise it, because I do not feel that I am placed in circumstances in which I can safely say that what the Sheriff did in this matter was not the right determination.

No. 53.  
The Glasgow  
City and District  
Railway  
Company

v.  
Hutchison  
and Others.

High Court,  
March 20.

Appeal.

The following was the Interlocutor :—

‘ *Edinburgh, 20th March 1884.*—Having considered this appeal, and heard counsel for the parties, Refuse the same : Find the Respondents entitled to expenses, which modify to five guineas, for which, and one guinea as the due of extract, decern.’

Agents for the Appellants—Messrs MILLAR, ROBSON, & INNES, S.S.C.

Agents for Respondents —Messrs J. & J. ROSS, W.S.

# HIGH COURT.

Present,

The LORD JUSTICE-CLERK.

HER MAJESTY'S ADVOCATE—*Brand, A.-D.*

AGAINST

WILLIAM THIELE *alias* CORNELIUS—*Rhind and Kennedy.*

PT—FRAUDULENT CONCEALMENT OF PROPERTY BY BANK—STATUTE 43 AND 44 VIC., c. 34, SEC. 13, SUB-SECS. AND 3 (The Debtors (Scotland) Act, 1880)—ALTERNATIVE GE—KNOWLEDGE AND BELIEF—DEBTOR, CONCEALMENT OF CTS BY—STATUTE 19 AND 20 VIC., c. 79, SEC. 81 (Bank-y (Scotland) Act, 1856) — RELEVANCY — LOCUS — TIME. indictment charged the putting away, carrying off, or con-g of his funds by a bankrupt, for the purpose of defrauding editors, also the statutory crimes and offences in section 13, ctions 1, 2, and 3 of 'The Debtors (Scotland) Act, 1880,' et forth in the minor that the panel did, alternatively, put , carry off, or conceal certain funds, &c., on an occasion en 25th October 1882 and 1st March 1883, which was n four months next prior to the presentation of the petition s sequestration. Further, in the charge under sub-section 1 ction 13 charging the failure fully and truly to disclose the of his affairs to the best of his knowledge and belief, the contained no specific averment regarding the panel's know-and belief.

pon objections, that the libel was not irrelevant by reason e alternatives objected to; also that the allegations in the e sufficiently negatived the possibility of the acts libelled g been done without knowledge and belief, and that there ot too great latitude taken in libelling the time, and the ions repelled accordingly.

e, ten months' imprisonment.

LIAM THIELE *alias* CORNELIUS *alias* WILLIAM AS THIELE, sometime carrying on business as a and decorative artist in Hanover Street, Edin- was indicted and accused: That albeit, by the : this and of every other well-governed realm, the

OL. V.

1884.

No. 54.  
Wm. Thiele  
or Cornelius.

High Court,  
Mar. 24 & 25.

Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.

1884. wickedly, feloniously, and fraudulently putting away, carrying off, or concealing of his funds, property, or effects by a bankrupt, for the purpose of defrauding his lawful creditors, is a crime of an heinous nature, and severely punishable: And albeit, by an Act passed in the 43d and 44th years of the reign of Her Majesty Queen Victoria, chapter 34, entitled ‘The Debtors (Scotland) Act, 1880,’ it is by section 13 thereof enacted that [the words of the section were here narrated. See the case of William Wilson, p. 49]: And by the said Bankruptcy (Scotland) Act, 1856, being an Act passed in the 19th and 20th years of the reign of Victoria, chapter 79, it is by section 81 thereof enacted that [here followed the words of the section]: Yet true it is and of verity, that you the said William Thiele *alias* Cornelius *alias* William Mathias Thiele are guilty of the said crime of wickedly, feloniously, and fraudulently putting away, carrying off, or concealing your funds, property, or effects, you being a bankrupt, for the purpose of defrauding your lawful creditors, and of the statutory crimes and offences set forth in the above recited 13th section of the said Debtors (Scotland) Act, 1880, sub-section (A) 1, 2, and 3, or of one or more of the said statutory crimes and offences, actor, or art and part:

No. 54.  
Wm. Thiele  
or Cornelius.

High Court,  
Mar. 24 & 25.

Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.

IN SO FAR AS, you the said William Thiele *alias* Cornelius *alias* William Mathias Thiele having for some time carried on business as a painter and decorative artist in Hanover Street, Edinburgh, and having become indebted to various individuals or firms in certain sums of money which you were unable to pay, and in particular to the individuals or firms, all or some of them, whose names and addresses are set forth in the first column of Schedule I. hereunto annexed and referred to, in the sums set forth in the second column of said schedule opposite to said names and addresses, respectively; and you having, while thereby insolvent, been, on or about the 12th day of August 1882, rendered notour bankrupt, by you having been duly charged, on or about the 5th day of said month of August, upon an extract registered bond granted by you in favour of the Scottish Heritable Security Company, Limited, dated 14th May 1873, and registered in the Books of Council and Session 10th November 1879, to make payment to the said Scottish

Heritable Security Company of the sum of £418, 14s. 3d. sterling due under said bond, and by the expiry of the days of charge without payment; and you having, while still notour bankrupt, been sequestrated under the said Bankruptcy (Scotland) Act, 1856, on or about 10th January 1883, by the Lord Ordinary officiating on the Bills, and Alexander James Paterson, chartered accountant, Edinburgh, having been elected trustee on your sequestrated estates on or about 1st February 1883, and his election having been duly confirmed by act and warrant of the Sheriff of the Lothians and Peebles on or about 14th February 1883, (1.) you the said William Thiele *alias* Cornelius *alias* William Mathias Thiele did, on an occasion or occasions between the 25th day of October 1882 and the 1st day of March 1883, the particular occasion or occasions being to the prosecutor unknown, and being within four months next prior to the presentation of the petition for sequestration of your estates, or after the presentation thereof, and after your estates had been sequestrated as aforesaid, and you being then bankrupt, as you well knew, wickedly, feloniously, and fraudulently, and for the purpose of defrauding your creditors, put away, carry off, or conceal a number of Prussian or German Government Bonds or Securities, commonly called Prussian Consols, to the value of 14,000 marks or thereby in German money, or of the value of £700 sterling or thereby, the description of the said bonds or securities being more particularly to the prosecutor unknown, your property, which should have been applied in payment of your creditors under your said sequestration, by clandestinely sending or conveying the same, or causing the same to be sent or conveyed, from your shop or premises at Hanover Street, Edinburgh, or from your said dwelling-house at Trinity, near Edinburgh aforesaid, to the town of Hanover, in Germany, or elsewhere abroad to the prosecutor unknown, and the same were appropriated by you to your own uses and purposes, and were not fully and truly disclosed by you in your state or states of affairs, nor in your examination in bankruptcy, nor in any way whatever in terms of the Bankruptcy (Scotland) Act, 1856, as part of your effects falling under your said sequestration, and were not delivered up by you to your creditors, or to the said Alexander James Paterson, as trustee on your said sequestrated estates, and your said creditors, or the said Alexander James Paterson, as trustee foresaid, have been defrauded of the same by you.

Likeas (2.) [There were two other charges in similar terms, having reference to a number of paintings, drawings, and miscellaneous articles, including in the second charge a gun, which it was alleged were clandestinely despatched by the panel to Hamburg, Hanover, and to London, from his dwelling-house and

1884.

No. 54.

Wm. Thiele  
or Cornelius.High Court,  
Mar. 24 & 25.Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.



1884.

No. 54.

Wm. Thiele  
or Cornelius.High Court,  
Mar. 24 & 25.Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.

shop. The gun and some of the articles having been, it was alleged, carried off by himself to Hanover.]

RHIND, for the panel, objected to the alternative mode of libelling adopted in the minor proposition as irrelevant.—The panel is charged with having put away, carried off, or concealed various funds, property, or effects, he being a bankrupt, for the purpose of defrauding his creditors. It is not said which of these alternatives is true, although the prosecutor must know which he intends to prove, and he is not entitled to take such latitude. The panel might, in terms of the indictment, be found guilty of any or of all the offences in the major, and there not be a majority of the jury satisfied that any one of these alternatives was proved. This mode of libelling also places the panel at the disadvantage of not knowing what is the kind of charge he is called upon to meet. Secondly, the latitude of upwards of four months taken in libelling the time in the first charge is too great. The prosecutor is not entitled to take more than the usual three months. Even under the third sub-section of section 13 of the Debtors Act, the section libelled, he is limited to four months, whereas the time libelled is between the 25th October 1882, and the 1st of March 1883. Thirdly, although it is libelled as an essential qualifying element of the charge in the major, under sub-section 1 of said 13th section, that the debtor shall, *to the best of his knowledge and belief*, fully and truly disclose the state of his affairs, nothing is said whatever in the minor about the panel's knowledge and belief; nor is it even alleged that any state of affairs was ever made up by the panel at all. Lastly, there is no *locus* indicated in the second charge at which the offence is said to have been committed. Certain articles were, it is said, sent away, but neither is the *locus* from which they were sent, nor that at which they were delivered, specified. There is nothing therefore in the indictment to show that the offence was not committed elsewhere than in Scotland. This objection

pecially applies to the charge of carrying off the double-barrelled gun. On these grounds we submit the indictment is irrelevant.

BRAND, *A.-D.*—The allegation in the second charge, regarding the putting away of the paintings, &c., forms a part only of the whole narrative in the indictment, which sets forth the crime charged, and the *locus* of the offences is also fully set forth at the outset. However, I may say that I do not intend to insist on the charge in so far as it relates to the carrying off of the gun.

The LORD JUSTICE-CLERK, without calling for further reply, said—I must repel the objections, and hold the libel relevant. The only objection I need refer to is that urged on the ground that there is no reference in the minor to the statement of the statutory charge in the major, that the duty of disclosure was *to the best of the panel's knowledge and belief*; but I need only point out that the failure to disclose, to the best of his knowledge and belief, in sub-section A 1, is much within the allegation in the minor of the indictment. The allegation here is not only that he did not disclose certain things to the best of his knowledge and belief, but that he deliberately dealt with the articles in question for the purpose of defrauding his creditors. Substantially that allegation in the minor negatives the possibility of the acts in question having been done against the panel's knowledge and belief.

The prisoner thereupon pleaded not guilty, and after a long trial the following verdict was returned:—

‘The Jury unanimously find the panel guilty of the statutory charge as set out in the first and second heads of the minor of the indictment.’

RHIND, for the panel, submitted—That although the full amount of punishment sanctioned by the statute was two years, the case was not one in which such a sentence should be pronounced, and the more especially as the panel had already endured a very considerable

1884.

No. 54.  
Wm. Thiele  
or Cornelius.

High Court,  
Mar. 24 & 25.

Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.

1884. amount of imprisonment in Germany before he was extradited. Sentence was pronounced on 26th March, of ten months'imprisonment.

No. 54.  
Wm. Thiele  
or Cornelius.

High Court,  
Mar. 24 & 25.

Debtors  
(Scotland)  
Act, 1880,  
sec. 13, sub-  
secs. 1, 2,  
and 3.

Crown Agent.  
Agent for the Panel—THOMAS M'NAUGHT, S.S.C.

Present,

The LORD-JUSTICE CLERK,

LORDS MURE and CRAIGHILL.

HER MAJESTY'S ADVOCATE—*R. V. Campbell, A.-D.*

AGAINST

MARY ANN WATSON—*James Clark.*

SENTENCE, AMOUNT OF—PREVIOUS CONVICTION—AGGRAVATION.—

A woman, fifty-seven years of age, pleaded guilty before a Circuit Court to the theft of an article of small value, aggravated by ten previous convictions. She had been sentenced on her sixth conviction in 1873 to eight years' penal servitude, the immediately preceding sentence being for a like period, and between 1882 and 1884 she had been four times convicted in the inferior Courts, and had received sentences of twelve months, twenty-one days, ten days, and thirty days, respectively. The case was certified for sentence, and the High Court, having regard to the fact that the panel had been nearly three months in prison, and without laying down any general principle, pronounced sentence of eight months' imprisonment.

No. 55.  
Mary Ann  
Watson.

High Court,  
May 19.

Theft and  
Prev. Con.

MARY ANN WATSON was charged before The Lord Justice-Clerk at Ayr on 1st April 1884, with the theft of  $7\frac{1}{2}$  yards of black corded cloth, aggravated by ten previous convictions of theft—1st, before the Sheriff of Ayrshire in 1855 ; 2nd to 6th, before the Circuit Courts at Ayr or Glasgow in 1859, 1861, 1862, 1866, and 1873 ; 7th, before the Sheriff of Ayrshire and a Jury in 1882 ; 8th, before the Sheriff Court of Renfrewshire in August 1883 ; 9th, before the Burgh Court of Stewarton in September 1883 ; and 10th, before the Police Court of Kilmarnock in January 1884. The sentences down

to 1873 were, respectively, sixty days, twelve months, eighteen months, four years, eight years, and eight years; for the subsequent convictions the sentences were twelve months, twenty-one days, ten days, thirty days. The panel was fifty-seven years of age, and she had been in prison since 25th February 1884.

1884.

---

No. 55.  
Mary Ann  
Watson.

---

High Court,  
May 19.

---

Theft and  
Prev. Con.

The panel pleaded guilty, and The Lord Justice-Clerk, in respect of the special circumstances, certified the case for sentence to the High Court.

The case having been called before the High Court,

The LORD JUSTICE-CLERK said—The case against this prisoner was called before me for trial at the Ayr Circuit Court, and a plea of guilty, as libelled, was tendered, when, looking at its complexion, I caused it to be certified to this Court for sentence. The charge is shoplifting of 7½ yards of black corded cloth, and the indictment sets forth ten previous convictions; the first series extends from the year 1855 down to the year 1873. In that interval the prisoner had sentences of sixty days, twelve months, eighteen months, four years, eight years, and again eight years; and upon a second series, between 1882 and the present year, she had sentences of twelve months, twenty-one days, ten days, and lastly, thirty days, respectively. It has always been a subject of anxiety to me, and I have no doubt to your Lordships also, how to deal with cases of the kind. It is a painful case, but it is, I think, plain that it is hardly a suitable one for a renewed sentence of penal servitude, especially looking to the age of the prisoner, fifty-seven years; and yet the object of bringing such cases before the Circuit or this Court is that your Lordships may give effect to the previous convictions, with a view to the repression of crime. In the present case, however, I feel some difficulty, because undoubtedly these cases tend to create an impression on the public mind both ways. Sometimes it is thought hard that the theft of an article of perhaps trifling value should be followed by a sentence of penal servitude, and, on the other hand, in a case of this kind

1884.

No. 55.  
Mary Ann  
Watson.

High Court,  
May 19.

Theft and  
Prev. Con.

—where there are no less than ten previous convictions, six at least of which are of a serious kind—it is sometimes not understood why a light sentence of imprisonment should follow on such a course of crime. I therefore thought it right, by bringing the case before your Lordships, to see if the Court could not come to a general understanding on charges made under these circumstances. Having now considered the matter, all I think we can say is that it lies with Crown counsel to consider in each individual case whether or not, in the circumstances, it is one which should be brought before this Court, or the Circuit Court, or not, in respect of the previous convictions. Beyond that I have nothing to suggest by way of a general rule. I regard the present case as one of a very serious nature as it stands, but I think that, looking to the period the prisoner has been already in jail, a term of eight months' further imprisonment will be sufficient in her case to meet the ends of justice.

LORD MURE.—I am not surprised that your Lordship should have felt a difficulty in dealing with this case upon Circuit, having regard to the prisoner's age, and the number of previous convictions, and I entirely concur with the remarks your Lordship has made. I certainly would have felt the same difficulty, and I now feel it difficult to deal with the case. But there have been no Circuit Court convictions recorded against the prisoner since the year 1873, and for the last offence an adequate punishment appears to have been inflicted; and when she got out she appears to have abstained from crime for some time, for her next conviction is dated in 1882. I think, therefore, it may be fairly said that a new course of crime was commenced by her in the latter year, and looking to her age and the time she has been in prison, we may, notwithstanding the convictions, pronounce the sentence your Lordship has proposed.

LORD CRAIGHILL.—I also concur in that sentence. It

is difficult to lay down any rule which will include all circumstances. The duty of determining whether a case such as this shall be prosecuted before the Circuit Court rests primarily with the public prosecutors, and they having exercised their discretion the Court has to determine according to the circumstances of each case. I have only to add that in my opinion the sentence proposed will meet the justice of the present case.

The panel was sentenced to be imprisoned for eight calendar months accordingly.

Crown Agent and Agent for the poor—

1884.  
No. 55.  
Mary Ann  
Watson.  
High Court,  
May 19.  
Theft and  
Prev. Con.

WESTERN CIRCUIT.

GLASGOW.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE—*R. V. Campbell, A.-D.*

AGAINST

ROBERT NEILSON—*M'Nair.*

**WILFUL FIRE-RAISING—INTENT TO DEFRAUD INSURANCE COMPANY — AGGRAVATION—RELEVANCY.**—The major proposition of an indictment charged wilful fire-raising, as also attempt to commit wilful fire-raising without mention of any aggravation; and the minor narrated that the panel had formed a fraudulent scheme to defraud an Insurance Company, and averred that the crimes were committed in pursuance of said scheme.—Objection to the relevancy that the minor proposition was not covered by the charge in the major repelled.

ROBERT NEILSON, Machine Maker, Glasgow, was indicted and accused of the crime of wilful fire-raising, as also attempt to commit wilful fire-raising.

No. 56.  
Robert  
Neilson.  
Glasgow,  
June 17.  
Fire-raising,  
&c.

IN SO FAR AS you the said Robert Neilson being, at and prior to the dates hereinafter libelled, tenant of the house or other pre-

1884.

---

No. 56.  
Robert  
Neilson.

---

Glasgow,  
June 17.

---

Fire-raising,  
&c.

mises in or near Candleriggs, Glasgow, occupied by you partly as a dwelling-house and partly as a showroom and workshop, for the purposes of the business carried on by you as a machine maker there, and the said house or other premises being part of and situated on the second flat of a tenement in Candleriggs, Glasgow, the ground floor and first flat of which tenement immediately under your said house or other premises were tenanted and occupied as a warehouse for fancy goods by George Todd, junior, fancy goods merchant there, and the whole of which tenement was the property of Joshua Buchanan, &c. ; and you the said Robert Neilson having entered into a contract of insurance with, and obtained a policy of insurance from, the Queen Insurance Company, numbered 2,063,134, which was current and in force for the period from 19th March 1884 to 25th March 1885, for the sum of £740, over your stock-in-trade and other moveable effects in the said house or other premises tenanted and occupied by you as foresaid, and the said insured sum being, as you well knew, at the said 19th day of March 1884, and at the dates hereinafter libelled, much in excess of the value of the goods insured by the said policy, and you the said Robert Neilson having, on or about the said 19th day of March 1884, and at and prior to the dates hereinafter libelled, formed a wicked and felonious scheme for defrauding the said Insurance Company, by setting fire to the said house or other premises, or to the said warehouse below the same, or to the tenement in which the said house or premises and the said warehouse were situated, and thereby or otherwise causing the goods insured by the said policy to be burnt or destroyed by fire, and by thereafter obtaining payment of the said insured sum from the said Insurance Company, on the pretence that the fire so to be raised by you was accidental, and that the goods insured as aforesaid, and to be destroyed by fire as aforesaid, were of the value of the said sum insured, you the said Robert Neilson did, in pursuance of your said scheme, (1.), on the 25th day of April 1884, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, wickedly, wilfully, and feloniously, set fire to the said warehouse or other premises in or near Candleriggs, Glasgow, the property of the said Joshua Buchanan, &c., by applying, through a ventilator or other opening, in a door leading to said warehouse or other premises from the first flat of the stair at No. 75 Candleriggs, Glasgow, some lighted or ignited substance, to the prosecutor unknown, to wooden racks, or to goods or toys lying on said racks, in said warehouse or other premises, or by projecting some lighted or ignited substance, to the prosecutor unknown, through said ventilator or other opening on to said racks, or to goods lying thereon, or on to some straw with which bottles con-



ning hair oil or other oil were packed in a box, and which box  
 as then lying on the floor of said warehouse or other premises  
 mediately behind said door, or in some other manner to the pro-  
 cutor unknown; and the said fire thus wickedly, wilfully, and  
 oniously set and applied by you did take effect, and did burn and  
 stroy part of said warehouse or other premises, particularly part  
 the flooring, part of the woodwork of the walls, and part of the  
 ling thereof, and also several wooden racks for holding goods  
 erein, and also parts of the windows and doors thereof, the same  
 ing the property of the said Joshua Buchanan, &c., and the  
 d fire thus raised by you would have spread and destroyed the  
 d warehouse or other premises, and also the said house or other  
 emises occupied by you as aforesaid, with the stock-in-trade and  
 ects therein, had the said fire not been discovered, and by the  
 ertions of well-disposed persons been subdued and extinguished.  
 Likeas (2.) [The indictment then set forth two other charges of  
 ating fire to the same premises in the month of May following, in  
 rther pursuance of said scheme.]

1884.

No. 56.  
 Robert  
 Neilson.

Glasgow,  
 June 17.

Fire-raising,  
 &c.

M'NAIR, for the panel, objected to the relevancy.  
 The charge in the minor proposition, containing as it  
 d the statement of a scheme to defraud an Insurance  
 ompany, is not conform to the charge in the major  
 oposition. Intent to defraud an Insurance Company  
 an aggravation of the crime which is not covered by  
 y similar statement in the major proposition.

CAMPBELL, A.-D., for the prosecution, replied that the  
 atement objected to was not intended as and did not  
 ount to a charge of aggravation of the crime. Some  
 atement of the kind was necessary before evidence as  
 the motive of the crime could be competently led, and  
 portant evidence of that kind was available in the  
 esent case. Such evidence would be excluded unless  
 tice were given to the panel by a statement in the  
 ictment. Reference was made to the cases of *Harris*  
*osenberg and Another*, Aberdeen, April 16, 1842,  
 oun, vol. i., p. 266; *G. B. Pyott*, High Court, June 16,  
 51, J. Shaw, p. 490; and *Daniel Black*, High Court,  
 h January 1857, Irv., vol. ii., p. 583.

LORD YOUNG.—The statement objected to seems to me  
 be superfluous. It is no more necessary under a

1884.

No. 56.  
Robert  
Neilson.Glasgow,  
June 17.Fire-raising,  
&c.

charge of wilful fire-raising to say that the accused formed a scheme to defraud an Insurance Company than it is under a charge of robbery to say:—‘You, having formed a wicked and felonious scheme to rob, did rob.’ But such a statement is otherwise unobjectionable, and is quite relevant.

The objection was accordingly repelled and the libel found relevant. The panel thereupon pleaded not guilty, and the case went to trial.

The Jury unanimously found the first and second charges not proven, and by a majority found the panel guilty of the third charge. Sentence of seven years’ penal servitude was pronounced.

Agent for the Panel—SAMUEL CARRICK, Writer, Glasgow.

---

## HIGH COURT.

Present,

The LORD JUSTICE-CLERK,

LORDS YOUNG and CRAIGHILL.

ALEXANDER FARQUHARSON, Suspender—*J. C. Smith.*

AGAINST

ROBERT GUTHRIE, Respondent—*The Hon. H. J. Moncreiff.*

SENTENCE—ASSAULT—STATUTE 29 AND 30 VIC., CAP. 117, SEC. 14 (Reformatory Schools Acts, 1866)—SUSPENSION. — A boy, fifteen years old, pleaded guilty in a Police Court to assaulting a woman by striking her once on the face to the effusion of blood, and was sentenced to be imprisoned for ten days, and thereafter to be sent to a reformatory school for four years, under the provisions of the Reformatory Schools Act, 1866, sec. 14. He brought a suspension, alleging that he had been hurried off to the Court, without notice to his parents, and having been asked to plead while he was without legal advice, had in his confusion pleaded guilty under a misunderstanding as to the nature of the charge. Six previous Police Court convictions of other offences than assault were produced in the High Court.

The Court, following the case of *M'Guire v. Fairbairn*, 9th Nov. 1881, Couper, vol. iv., p. 536, in respect of the trifling nature of the offence, and of the want of notice to the boy's parents, *suspended* the conviction, in so far as regarded the order of detention in the reformatory school.

ON 14th April 1884, ALEXANDER FARQUHARSON, a boy of fifteen years of age, was charged in the Burgh Court of Kelso at the instance of ROBERT GUTHRIE, Procurator-fiscal, with the crime of assault, in so far as on 22nd March, within the house in Kelso occupied by John Pearson, he did assault Pearson's wife 'by striking her one severe blow on the face with his fist to the hurt and injury of her person, and to the effusion of blood.'

1884.  
No. 57.  
Farquharson  
v.  
Guthrie.  
High Court,  
July 15.  
Suspension.

Farquharson pleaded guilty, and was sentenced to be imprisoned for ten days, and thereafter to be detained in a reformatory school for four years.<sup>1</sup>

After the ten days' imprisonment had expired, and when he was in the Inverness Reformatory School, Farquharson, with the concurrence of his father, presented a bill of suspension and liberation.

He stated that the complaint was served upon him while he was in the prison of Jedburgh undergoing a sentence of fourteen days' imprisonment for a contravention of the Tweed Fisheries Acts; that immediately on his liberation he was taken to Kelso and placed at the bar of the Police Court; that without any communication to his parents, whose address the respondent well

<sup>1</sup> Statute 29 and 30 Vic., cap 117 (The Reformatory Schools Act, 1866).

Section 14—'Whenever any offender who, in the judgment of the Court, Justices, or Magistrate before whom he is charged, is under the age of sixteen years, is convicted, on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the Court, Justices, or Magistrate may also sentence him to be sent at the expiration of his period of imprisonment to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.'

1884. knew, and without counsel or agent on his behalf, and  
No. 57. the charge of assault having merely been read over to  
Farquharson him, he was required to state whether or not he was  
v. guilty thereof; and that in his surprise and confusion at  
Guthrie. his unexpected apprehension he pleaded guilty, under  
High Court, the belief that he was charged with a breach of the peace  
July 15. with Pearson, and not with assaulting Mrs Pearson. He  
Suspension. denied that he had committed any assault, though he  
admitted that he had unintentionally struck her one  
blow when defending himself against her husband.

He pleaded:—(4) These sentences were in the circumstances *ultra vires* of a magistrate in disposing of a petty charge of assault.

The respondent, the Procurator-fiscal, produced six convictions against Farquharson, two for petty theft, and four for contraventions of the Tweed Acts. He also stated further that Farquharson's father had been present during the trial in the Police Court.

J. C. SMITH, for the suspender, contended.—The sentence should be set aside. The case does not differ in principle from the decision in *M'Guire v. Fairbairn*, High Court, Nov. 9, 1881, Couper, vol. iv., p. 536, in which it was held that the enactment empowering magistrates to send certain offenders to a reformatory school did not apply to petty offenders, which the suspender here is. Besides, the want of notice to his parents, or of any opportunity afforded him of communicating with a law agent, vitiated, we submit, the whole proceedings.

MONCREIF, for the respondent, answered.—The offence which was committed in this case was a more serious one than that committed in the case of *M'Guire* quoted. The proceedings were quite regular, and the boy was properly cited. In point of fact his parents knew that he was charged, and his father was in Court during the trial and stated no objection. The sentence was quite within the statutory powers and discretion of the magistrate, and the Bill ought to be refused.

The LORD JUSTICE-CLERK.—It is impossible to say that this is a very harsh case. What the magistrates have done may have been the best thing for this boy's welfare. We have had an account—no doubt a substantially accurate one—of his previous history, which goes to explain why the magistrates imposed such a punishment. But I think a power so wide as that conferred by the Act should never be exercised without notice to the parents or guardians of the lad.

1884.  
No. 57.  
Farquharson  
v.  
Guthrie.  
High Court,  
July 15.  
Suspension.

LORD YOUNG.—I agree with your Lordship. I do not think it is fitting that a sentence of this kind should be imposed without notice to the boy's parents—that for a petty assault several years in a reformatory should be added to the punishment of imprisonment for a few days—though looking to the previous history of this boy, the residence in the reformatory might have had salutary results. I am quite ready to give the magistrates every credit for acting with good feeling and to the best of their judgment in regard to the true interests of the boy. But giving these feelings their due weight as explanatory of the magistrates' conduct, I think that a sentence of four or five years in a reformatory, imposed without any notice to the boy's parents, cannot be sustained. To sustain such a sentence, having regard to the nature of the offence, would be contrary to our judgment in the case of *M'Guire v. Fairbairn*.

LORD CRAIGHILL concurred.

The Court pronounced this interlocutor:—

'*Edinburgh, 15th July 1884.*—Having considered this bill, and heard counsel for the parties: Pass the bill so far as regards the order of detention in the reformatory complained of: Suspend the said order of detention *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to three guineas; for which, and one guinea as the dues of extract, decern against the respondent.

Agent for the Suspender—D. TURNER, S.L.  
Agent for the Respondent—RONALD & RITCHIE, S.S.C

Present,

The LORD JUSTICE-CLERK,

LORDS YOUNG and CRAIGHILL.

JAMES LOWDON, Appellant—*C. S. Dickson.*

AGAINST

JAMES INGRAM, Respondent—*Lanq.*

FISHING — HERRING FISHERY — GOVERNMENT BRAND — HERRING BARRELS—ACT 55 GEO. III., CAP. 94, SEC. 12 (British White Herring Fishery Act, 1815).—The 12th section of the Act Geo. III., cap. 94, enacts that no white herrings shall be cured, packed, or put up in Great Britain in any barrel which, *inter alia*, shall not contain 32 gallons English wine measure.

Held that a fish-curer had contravened the Act by curing and packing barrels under the specified size, although he had not tendered them for branding or offered them for sale.

1884. JAMES LOWDON, fish-curer, Stornoway, was charged in  
 No. 58. the Sheriff Court of Ross-shire, at Stornoway, under the  
 Lowdon Summary Jurisdiction (Scotland) Acts, 1864 and 1881,  
 v. Ingram. at the instance of JAMES INGRAM, officer of fisheries,  
 High Court, Stornoway, with a contravention of the Act 55 Geo. III.,  
 July 15. cap. 94, sec. 12,<sup>1</sup> in so far as, on 30th May 1884, he, or  
 Appeal.

<sup>1</sup> Statute 55 Geo. III., c. 94 (An Act to continue and amend several Acts relating to the British White Herring Fishery).

Section 12, after amending in part sec. 4 of the previous Act 29 Geo. II., c. 23, enacts—‘That from and after the first day of June 1816 no white herrings shall be cured, packed, or put up in Great Britain or on board any vessel or boat employed in the British Herring Fishery in any barrel which shall be made in whole or in part of fir, or which shall not be one-half part of an inch in thickness throughout of made work, or which shall not contain 32 gallons English wine measure; and that if any white herrings shall be cured, packed, or put up in any barrel which shall be made in whole or in part of fir, or which shall not be one-half part of an inch in thickness throughout of made work, or which shall not contain 32 gallons English wine measure, all such herrings, with the barrel containing the same, shall be forfeited, and shall and may be seized by an officer of the fishery, customs, or excise.’—The Act also makes provision for the branding barrels and half barrels of herring as a

some person for whom he was responsible, did, within his herring-curing premises in Stornoway, 'cure, pack, or put up a quantity of white herring in twenty or thereby barrels, which barrels were and are of illegal size, and in violation of the said statute, in respect they were and are too small, and not capable of containing the statutory quantity of 32 gallons English wine measure, as provided by the said statute ; in consequence of which illegal size and contravention, six or thereby of the said barrels, with their contents, have been seized by the complainer, in virtue of powers conferred upon him as officer of the fisheries foresaid, and said six barrels are now in the complainer's possession ; whereby the said James Lowdon has incurred a forfeiture of the said twenty or thereby barrels, or six or thereby barrels, together with the

1884.

No. 58.  
Lowdon  
v.  
Ingram.

High Court,  
July 15.

Appeal.

condition of obtaining the bounties payable under that Act and the previous Act 48 Geo. III., c. 110.

Statutes 5 Geo. IV., c. 64, and 7 Geo. IV., c. 34. The bounties were abolished by these Acts. But by the subsequent Act 11 Geo. V. and 1 Will. IV., c. 54 (An Act to Revive, Continue, and Amend certain Acts relating to Fisheries), it was enacted and declared (sec. ) that nothing in the said Acts of 5 and 7 Geo. IV. had repealed the provisions of 48 Geo. III., c. 110, and 55 Geo. III., c. 94, in so far as they related to the placing a mark or character on barrels or half barrels containing herrings properly cured.

Statute 21 and 22 Vic., c. 69 (Act to Impose Fees on the Branding of Barrels under the Acts concerning the Herring Fisheries in Scotland).

Section 1.—'From and after 31st December 1858 there shall be payable for and in respect of every barrel of herring branded or marked under the said Acts, or any of them, a fee of fourpence, and for every half barrel so branded or marked the fee of twopence, on or before the branding or marking of the same respectively, by the persons producing, in terms of the said recited Acts, such barrels or half barrels respectively to be branded or marked ;' and it enacts that all such fees shall be paid to the officers of the establishment maintained for branding or placing such marks or characters.

Statute 31 and 32 Vic., c. 45 (The Sea Fisheries Act, 1868).

Section 71, Schedule II., repeals in part the Act 55 Geo. III., c. 94, but the repeal does not include sec. 12 so far as it relates to Scotland.



1884.

No. 58.

Lowdon

v.

Ingram

High Court,  
July 15.

Appeal.

herrings contained therein, all as provided for by the said Act.' The complaint then prayed the Court to convict the said James Lowdon of the foresaid contravention, and to adjudge him to suffer the penalty or forfeiture provided for by the said Act.

The Sheriff-substitute (Black) convicted the accused of the contravention charged as regarded one barrel, and declared the barrel and the herrings it contained to be forfeited.

Lowdon took a Case, in which it was stated by the Sheriff-substitute that he found it proved as matter of fact, that, at the time mentioned in the complaint, the complainer entered Lowdon's curing-yard and there seized one barrel containing white herrings, that had been cured by him and packed in the barrel by him ; that the barrel was not capable of containing more than  $24\frac{2}{3}$  gallons imperial measure, being less than 32 gallons English wine measure ; and that the barrel and herrings belonged to Lowdon. There was no evidence that the barrel had been tendered for branding, or offered by Lowdon, or put out of his curing-yard, for export or sale.

The question of law stated by the Sheriff was :—  
'Whether the facts found proved by me, above mentioned, amount in law to a contravention of the said statute?'

DICKSON contended for the appellant.—Section 12 cannot be read absolutely so as to prevent any one from putting herrings into any barrel he pleased, so long as he does not sell them as having the Government brand. The provision that herrings must be packed in barrels of a certain size was formerly, while bounties were given, a condition of obtaining the bounty, and is now a condition of obtaining the Government brand. The Act 55 Geo. III., cap. 94, made provision for the branding barrels and half barrels of herring as a condition of obtaining the bounties payable under that Act and the previous Act 48 Geo. III., c. 110. By the Act 5 Geo. IV., c. 64, and 7 Geo. IV., c. 34, the bounties were abolished, but

the subsequent Act 11 Geo. IV. and 1 Will. IV., c. 1, sec. 1, it was enacted and declared that nothing in the Acts of 5 and 7 Geo. IV. had repealed the provisions 48 Geo. III., c. 110, and 55 Geo. III., c. 94, relating to the placing of a mark or character on barrels or half barrels containing herrings properly cured. The Act and 22 Vic., c. 69, contained further provisions with reference to branding. But, if the brand is not used, there is no rule as to the size of the barrels.

It is held that there is no rule which would prevent the use of any other vessel even for private use. The appellant's barrels are known in the trade as containing a certain amount of herrings, and are not meant or represented to contain 32 gallons. Besides the 12th section of the statute libelled has been repealed by the Sea Fisheries Act 1868 (31 and 32 Vic., cap. 45), sec. 71, except as regards Scotland, and the construction contended for by the other side, therefore, would seriously prejudice the Scotch curer who does not desire to take advantage of the Government brand.

The respondent's counsel was not called on.

**THE LORD JUSTICE-CLERK.**—On the construction of the statutes I cannot entertain any doubt. It is perfectly clear, as has been said in argument, that the provisions of the statute arose out of a bounty given by Government for the encouragement of the herring fishery, and these provisions originally, no doubt, applied to the state of the law at the time when such bounties were given. But the bounties have been abolished, and the Government brand has been retained, and with the Government brand have been retained all those provisions for the uniformity and honesty of the trade. All traders ought to apply for the Government brand. The general provisions to secure the uniformity of measures—especially those relating to the herrings are intended for foreign markets—among which they still remain as they were originally enacted, and Mr Dickson was unable to suggest any qualifying words which he could legitimately read into the provisions of

1884.  
No. 58.  
Lowdon  
v.  
Ingram.  
High Court,  
July 15.  
Appeal.

1884.  
 No. 58.  
 Lowdon  
 v.  
 Ingram.  
 High Court,  
 July 15.  
 Appeal.

the 12th section of the Act 55 Geo. III., c. 94, on which this prosecution is founded. One of the provisions is that herrings shall be packed in barrels of a certain standard ; and it seems obvious that herring curers shall have barrels of the standard required. There are powers given to the officers of fisheries to enter the curing-yard, not when the brand is applied for, but at any time, to see that the Government standard is observed, and accordingly one of these officers entered the yard of this appellant—which we were told is a large and important one. He found on doing so herrings packed in barrels which are studiously made less than the Government standard size. In these circumstances, I am unable to see any ground on which it can be said that the Act does not apply. As little can I see any qualification that can be put upon its provision. As to the case of herrings privately packed by a consumer for consumption and not for sale, that case is not the one we have here. I am for affirming the judgment appealed from.

LORD YOUNG and LORD CRAIGHILL concurred.

The following was the Interlocutor :—

*‘Edinburgh, 15th July 1884.—Having considered this case, and heard counsel for the parties, Dismiss the appeal : Affirm the determination of the inferior Judge :—Find the respondent entitled to expenses, which modify to seven guineas ; for which, and one guinea as the due of extract, decern against the appellant.’*

Agent for the Appellant—R. C. GRAY, S.S.C.

Agent for the Respondent—THOMAS CARMICHAEL, S.S.C.

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY, Appellants—  
*Trayner—R. V. Campbell.*

AGAINST

MRS MARY ANN MADDEN AND ANOTHER (Meldrum's Trustees),  
Respondents—*Mackintosh—Dundas.*

**RAILWAY—STATUTE 45 AND 46 VIC., c. CCXVI, SEC. 39** (Glasgow City and District Railway Act, 1882)—**CONSTRUCTION OF STATUTE—PORTION OF STREET 'OPPOSITE' OBSTRUCTION—TITLE TO SUE.**—A private Act of Parliament which empowered a company to construct an underground railway within a city, and for the purposes of their undertaking to interfere with and open up the carriage-way of streets, enacted that if such carriage-ways should not be restored within three months, the company should be liable in a penalty recoverable on summary application 'by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored.'

**Held** that it was sufficient to give the owner or tenant of a corner house a title to recover the penalty that the obstruction was partly opposite the area, though the portion of street opposite the house itself was clear of obstruction.

**RAILWAY—PENALTY—INFORMER—INTERFERENCE WITH CARRIAGE-WAY—STATUTE 8 AND 9 VIC., c. 33, SEC. 142** (Railway Clauses Consolidation (Scotland) Act, 1845).—A private Act of Parliament which empowered a company to construct an underground railway within a city, enacted that the penalty incurred by the company for not restoring within a certain time the carriage-way of streets which they were authorised to interfere with, should be recoverable 'by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored.' The private Act incorporated the Railway Clauses Consolidation (Scotland) Act, 1845.

**Held** that a proprietor or tenant proceeding for the recovery of these penalties was in the position of an informer for the public interest, and, consequently, that half the penalty was properly apportioned to the poor of the parish under sec. 142 of the Railway Clauses Consolidation Act.

## PROCESS—SIST OF CRIMINAL PROCEEDING PENDING DECLARATOR.—

Where the question of principle involved had already been made the subject of determination by the High Court of Justiciary in an appeal in a former prosecution, *held* that a Sheriff had rightly refused to sist a prosecution for penalties pending the issue of a declarator raising the same question.

1884.      THIS was an appeal on a Case stated under the  
 No. 59.      Summary Prosecutions Appeals Act, 1875, against a  
 Glasgow      judgment of one of the Sheriff-substitutes for Lanark-  
 City and Dis-      shire (D. D. Balfour), convicting the appellants, the  
 trict Railway      GLASGOW CITY AND DISTRICT RAILWAY COMPANY, upon  
 Company      a complaint under the Summary Jurisdiction Acts, 1864  
 v.      and 1881, at the instance of Mrs MARY ANN MADDEN,  
 Meldrum's      and another, trustees of the deceased Edward Meldrum,  
 Trustees.      which charged a contravention of section 39 of the  
 High Court,      Glasgow City and District Railway Act, 1882 (45 and  
 July 15.      46 Vict., cap. ccxvi.). [See *supra*, page 421, *et seq.*  
 Appeal.      note.]

The complainers, Meldrum's trustees, were proprietors, in trust, of Nos. 181 and 183 Pitt Street, Nos. 214 to 234 West Regent Street, and Nos. 134 to 138 Holland Street, Glasgow, which properties are on the north or opposite side of West Regent Street from the properties of the trustees of the deceased Robert Hutchison, who brought a similar complaint to the present one before the Sheriff Court at Glasgow, and obtained a conviction thereon, in which the appellants were adjudged to pay a penalty of £256. [See *supra*, p. 420.] The present, like the previous, complaint set forth that the railway company had, for the purpose of their works, on or before 1st June 1883, closed for traffic a portion of the carriage-way of Holland Street, at the junction of Holland Street and West Regent Street, opposite to the property of the complainers, and had failed to restore the carriage-way within three months from the said 1st June, as required by the statute, and so had become liable in the statutory penalty.

The company pleaded not guilty, and then craved the

Sheriff-substitute to sist the case pending the issue of the action of declarator subsequently decided in the Court of Session, 18th July 1884, R. XI., p. 1110.

The Sheriff refused the motion, and after proof, on 18th May, convicted the company of the contravention charged, and adjudged them to forfeit and pay the sum of £63 of modified penalty for the period from 8th January 1884 to 18th February 1884, both inclusive, a penalty for the period prior to 8th January 1884 having been previously adjudged in favour of Hutchinson's trustees [see *supra*, p. 420]), one-half the penalty to be paid to the complainers and the other half to the inspector of poor of the Barony Parish of Glasgow for the benefit of the poor of that parish.<sup>1</sup>

The company took a Case.

The following were the material facts stated:—‘That a straight line drawn at right angles to and from any part of either front of the respondents’ building would not touch the portion of the street occupied by the appellants, but would clear their barricade by several feet. A straight line drawn at right angles to the Holland Street end of the private area belonging to the respondents in West Regent Street would, however, touch the portion of the street so occupied—that is, the barricade is opposite the said area to the extent of foot 10 inches.’ The case further stated that the respondents’ feu extended to the centre of the streets (though that portion could not be built on), and that

1884.  
No. 59.  
Glasgow  
City and District Railway  
Company  
v.  
Meldrum's  
Trustees.  
High Court,  
July 15.  
Appeal.

<sup>1</sup> The Glasgow City and District Railway Act, 1882, incorporated the Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vic., cap. 33), section 142 of which enacted with reference to penalties incurred under its provisions that ‘the Sheriff or Justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than half thereof to the informer, and shall award the remainder to the kirk-session or treasurer or collector of the funds for the poor of the parish in which the offence shall have been committed, for the benefit of the poor of such parish.’

1884.

No. 59.

Glasgow  
City and Dis-  
trict Railway  
Companyv.  
Meldrum's  
Trustees.High Court  
July 15.

Appeal.

part of the obstruction was within the carriage-way of Holland Street included in their feu.

The questions of law for the opinion of the High Court were:—(Put for the appellants) ‘(1.) Whether in the circumstances the sist sought should have been granted? (2.) Whether, in the sense of the special Act founded on, the property of the respondents was “opposite” that part of the street occupied by the appellants; and whether the respondents were entitled to sue for the penalties in question? (3.) (Put for the respondents) Whether the penalty should not have been made wholly payable to the respondents?’

LORD YOUNG.—I think that this case is not distinguishable from that which we formerly decided. The Sheriff has asked us, in the first place, the question whether he ought to have sisted procedure pending the action of declarator which is now under consideration in the civil Court. I think that he was right in refusing to do so.

We decided in the former case that the process was well raised as a criminal process, and the appeal well taken to this Court. What we had therefore to determine was whether the prosecution was well founded, and to that end we determined the question of law involved in the case in a particular way, and accordingly when the declarator was brought in the civil Court before Lord Kinnear, his Lordship very properly said that the question was settled by the authority of the decision in the Supreme Criminal Court. I think, therefore, that the Sheriff was right in declining to delay the exercise of his jurisdiction because of the existence in the Court of Session of a declarator as to the general question of law, which had already been decided in this Court.

The only other question which it is necessary to consider is, whether the whole penalty ought to be given to the party complaining, or whether the Sheriff acted legally in apportioning it as he did? The penalty is really a compulsitor on the railway company to cease



obstruction of the street. The ground of the Sheriff's judgment is that the obstruction has become illegal—that there is no longer any authority for it. The penalty is intended to stimulate the giving of information, not to compensate the sufferer, who may have other remedies. He is a compulsitor, and the prosecution is invited by a certain part of the amount of it being given to the informer—using that word, not in any technical sense, such as that in which it is used in England, and with which we were at one time familiar in Exchequer cases. He merely means the party who lays the information, and he agrees with the Sheriff-substitute that section 142 of the Railway Clauses Act applies, and that he was entitled to apportion the penalty as he did. I think that the appeal should be refused.

LORD CRAIGHILL.—I concur.

The LORD JUSTICE-CLERK.—I agree in thinking that there was no reason in the existence of the civil action for the Sheriff not hearing and determining the case before him, and I also agree in holding that the obstruction was 'opposite' to the complainers' premises in the sense of the statute. That word ought, I think, to receive a fair meaning. Lastly, I think that this complaint was brought by an informer,—that is, by one who is not seeking to recover a sum for his proper patrimonial interest. I therefore think, with your Lordships, that his appeal should be refused.

The following was the interlocutor :—

'*Edinburgh, 15th July 1884.*—Having considered his case and heard counsel for the parties, Dismiss the appeal: Affirm the determination of the inferior Judge: Find the respondents entitled to expenses, which modify to seven guineas; for which, and one guinea as the dues of extract, decern against the appellants.'

Agents for the Appellants—MILLAR, ROBSON & INNES, S.S.C.

Agents for the Respondents—J. & J. ROSS, W.S.

1884.

No. 59.  
Glasgow  
City and District Railway  
Company

Meldrum's  
Trustees.

High Court,  
July 15.

Appeal.

Present,

THE LORD JUSTICE CLERK.

LORDS YOUNG and CRAIGHILL.

JAMES CAMPBELL, Suspenders—*Kennedy*.

AGAINST

GEORGE CADENHEAD (Procurator-fiscal of the Burgh of Aberdeen),  
Respondent—*M'Kechnie*.

**PROOF—TUTORING WITNESS—SUSPENSION.**—A hotelkeeper, convicted of a contravention of his certificate, brought a suspension on the ground that the evidence upon which the conviction had proceeded was incompetent, averring that of three police-constables, who were the only witnesses for the prosecution, the first examined had communicated to the second, when about to be examined, the questions which had been asked and the answers which had been given in cross-examination; that the second constable had made a similar communication to the third; that these communications were made for the direction and guidance of the witnesses to whom they had been made; and that the evidence given by these witnesses was false. The Court being of opinion that these averments were irrelevant, *refused* the suspension.

1884. ON 12th June 1884 JAMES CAMPBELL, hotelkeeper in  
Aberdeen, was found guilty in the Burgh Court there, at  
No. 60. the instance of GEORGE CADENHEAD, the Procurator-  
Campbell fiscal, of a contravention of the Public Houses Acts.  
v. Cadenhead.  
High Court, He brought a suspension against the Procurator-fiscal,  
July 15. stating,—‘(3) The first witness examined in support of  
Suspension. the complaint was Alexander Smith, a detective of the  
Aberdeen City Police, who, as soon as his evidence was  
concluded, retired to where the second witness for the  
prosecution, William M'Donald, constable, was standing,  
and communicated to him the questions which had been  
asked him by the suspender's agent in cross-examina-  
tion, and the answers he had given to these questions,  
and also, generally, what he had said during examina-  
tion. This was done for the direction and guidance of  
the witness M'Donald when under examination. The

obtaining of truthful answers to the said questions was vital to the suspender's defence to the complaint. McDonald, the second witness, on his evidence being given, proceeded in like manner to instruct the third and last witness for the prosecution, John Manson, constable, as to what he had answered to certain questions, for his direction and guidance, when under examination. (4) Upon the evidence of said witnesses, thus concocted and arranged, the said magistrate convicted the suspender of said charge, and fined him in the sum of £1, 5s., with £1, 8s. of expenses, and failing payment, ordained him to be imprisoned for eight days. The said evidence was false; and it was incompetent and illegal, and ought not to have been received. There was no other evidence in support of the complaint.' The suspender also stated that neither he nor his agents were aware of these facts at the time of the trial.

The suspender pleaded:—The sentence complained of should be suspended, with expenses, as craved, in respect of the evidence upon which the conviction proceeded was, in the circumstances condescended on, false and incompetent.

KENNEDY for the suspender contended.—The averment made by the suspender is that of tutoring a witness by a witness who has been examined. The evidence of the constables was the only evidence before the magistrates, but it is enough to make a conviction bad that there has been incompetent evidence upon which it may have proceeded.

The respondent was not called on.

The LORD JUSTICE-CLERK.—I do not say that what is stated to have occurred here might not constitute a serious objection to a conviction, but we should require allegations of a much more precise and specific character than we have here before entertaining a suspension. What one of these policemen said to the other before the latter gave his evidence may have been perfectly innocent. It is not said what it was, and it is not said

1884.

---

 No. 60.  
Campbell  
v.  
Cadenhead.

---

 High Court,  
July 15.

---

 Suspension.

1884. that it had any effect in tutoring the other's mind. At  
 No. 60. the same time, while, as I have said, it would have  
 Campbell required much more precise allegation to induce us to  
 v. entertain this suspension, I must say that the holding of  
 Cadenhead. such communication in the course of the trial is far from  
 High Court, laudable, and that it ought not to be permitted.  
 July 15.  
 Suspension.

LORD YOUNG.—I am of the same opinion, and only wish to add that any police-officer who makes a communication to other witnesses as to what he has been asked as a witness in the course of a trial, either in the witness-room or while they are on their way to the witness-box, is and ought to be severely censurable. But it is one thing to say that, and quite another thing to say that such communication will be sufficient to set aside a conviction. If such a rule holds good in reference to Police Court convictions, it must equally hold good with reference to convictions obtained in higher Courts. While, therefore, I guard myself by saying that the making of such communications is censurable, I cannot accept it as a ground for upsetting the whole of these proceedings.

LORD CRAIGHILL concurred.

The following was the Interlocutor :—

‘*Edinburgh, 15th July 1884.*—Having considered this bill, and heard counsel for the parties, Refuse the bill : Find the respondent entitled to expenses, which modify to three guineas ; for which, and one guinea as the dues of extract, decern against the complainer.’

Agent for the Suspender—JOHN MACPHERSON, W.S.  
 Agent for the Respondent—D. HILL MURRAY, Solicitor.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ALEXANDER FERGUSON, Suspender—*M'Kechnie*.

AGAINST

JAMES M'NAB, Respondent—*Ure*.

**SUSPENSION — OPPRESSION — ALIBI — REMIT TO LEAD FURTHER EVIDENCE.**—In a suspension of a conviction for day poaching, the suspender alleged that he had only received a copy of the complaint on the day before the trial, and that the Sheriff had oppressively refused a motion by him for an adjournment in order that he might adduce witnesses to instruct his averment that at the time when the offence charged was said to have been committed he was not within sixty miles of the *locus delicti*.

The Court, before answer, *remitted* to the Sheriff to investigate into the allegations with reference to the alleged *alibi*, and on a report by the Sheriff that, in his opinion, the *alibi* had been proved, *suspended* the conviction.

ALEXANDER FERGUSON was, on 14th November 1883, charged, at the instance of JAMES M'NAB, tenant of the lands of Dumyat, before the Sheriff-substitute (Grahame) at Dunblane, with the offence of trespassing on the lands of Dumyat in the day-time in pursuit of game, on 26th October 1883, in contravention of the Act 2 and 3 Will. IV., c. 68.

1884.  
No. 61.  
Ferguson  
v.  
M'Nab.  
High Court,  
July 19.  
Susp. & Lib.

He pleaded not guilty, but was convicted of the contravention charged, and fined 10s., with the alternative of fourteen days' imprisonment.

He brought a suspension and liberation, averring (Stat. 4)—‘The complainer was not guilty of the offence so charged against him, and in point of fact he was not, at the time when the said offence is alleged to have been committed, residing within sixty miles of the place set forth in the said complaint. He was at the said time, and had been for several weeks prior thereto, at Gart-

1884.      ness, in the county of Dumbarton, where he was em-  
 No. 61.      ployed in his trade as a weaver by Mr John Buchanan,  
 Ferguson      woollen manufacturer there.' [Then followed averments  
 v.              to shew that the complainer had been improperly cited,  
 M'Nab.       and had in consequence only received the complaint on  
 High Court,   the 13th November.] 'He was able half an hour or  
 July 19.       thereby before the diet of compearance to procure the  
 Susp. & Lib.   services of a law-agent, to whom he stated his innocence,  
                  and that if he were allowed an opportunity he could  
                  adduce witnesses to prove his defence. The said wit-  
                  nesses, who could prove that at the time when the said  
                  offence is alleged to have been committed the complainer  
                  was at his work at Gartness aforesaid, are . . . . The  
                  Sheriff-substitute, however, as the minutes of procedure  
                  shew, refused the motion of the complainer's agent for  
                  an adjournment, and thus deprived the complainer of  
                  an opportunity of leading evidence. This refusal was  
                  oppressive, more particularly as the said Sheriff-sub-  
                  stitute, in the case of other two of those accused in the  
                  same complaint with the complainer, adjourned the diet  
                  for a week.'

The suspender pleaded :—(4) The complainer having been oppressively and illegally refused an opportunity of proving his defence, he is entitled to have the bill passed, with expenses ; and farther, he is entitled to instant liberation.

On 22d February 1884 the Court pronounced this Interlocutor :—'Having considered this bill, and heard counsel for the parties before answer, in respect of the averments made by the complainer in article 4 of his statement of facts, Remit to John Grahame, Esq., Sheriff-substitute of Perthshire, to investigate into the allegations there made by the complainer with reference to the alleged *alibi*, and to report either the evidence taken by him or the result thereof, as he shall judge to be most fitting for the information of this Court ; said report to be lodged with the Clerk of Justiciary *quam primum*.'

The Sheriff-substitute reported the evidence to the Court.

Thereafter, on 15th July, the complainer argued that the evidence, if the Court thought it competent to examine it, the defence of *alibi* was established.

Both parties, however, having stated their willingness that the case should be again remitted to the Sheriff-substitute, for his opinion on the evidence, the Court pronounced this Interlocutor:—‘Having resumed consideration of this case and heard counsel: Before answer admit to the Sheriff-substitute, the said John Grahame, sq., to report to this Court whether or not in his opinion the alleged *alibi* has been proved.’

The Sheriff-substitute reported that ‘in his opinion the alleged *alibi* in question has been proved.’

Thereafter the Court pronounced this Interlocutor:—

‘*Edinburgh, 19th July 1884.*—Having considered this bill, with report of date 16th July current, by John Grahame, Esq., advocate, Sheriff-substitute of Perthshire, and heard counsel, in respect the defence of *alibi* proponed for the complainer has been established, pass the bill: Suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to five guineas; for which, and one guinea as the dues of extract, decern against the respondent.’

Agent for the Suspender—JAMES M‘CAUL, S.S.C.  
Agents for the Respondent—CUMMING & DUFF, S.S.C.

---

Present,

The LORD JUSTICE-CLERK.

HER MAJESTY’S ADVOCATE—*Brand, A.-D.*

AGAINST

DAVID M‘GREGOR and ALEXANDER JAMES PRINGLE—*Jameson.*

RAUDULENT BANKRUPT—STATUTE 43RD AND 44TH VIC., C. 34,  
SEC. 13, (A) 5, (B) 3 (Debtors (Scotland) Act, 1880)—RELEVANCY  
—SENTENCE — BREACH OF TRUST AND EMBEZZLEMENT. — Two

1884.

No. 61.  
Ferguson  
v.  
M‘Nab.

High Court,  
July 19.

Susp. & Lib.



wool brokers having been charged under 'The Debtors (Scotland) Act, 1880,' section 13, sub-sections (A) 5 and (B) 3, with having when insolvent, and within four months prior to petitioning for sequestration, obtained on credit in pursuance of a fraudulent scheme, large quantities of wool without paying or intending to pay therefor, and with paying with the proceeds thereof various persons from whom they had received previous consignments of wool on sale or commission, which they had sold, but had failed to account for the price thereof; and also with paying, out of said proceeds, debts due by them to relatives and friends. And having been further charged, also under said 13th section, (A) 5, with having, within four months prior to the presentation of their petition for sequestration, pledged or disposed of, otherwise than in the ordinary way of trade, certain parcels of wool, being portions of the wool obtained on credit as libelled in the previous charge, and not paid for, and with intent to defraud their creditors. The libel was found relevant without objection taken, and the panels pleaded guilty to a portion of the first mentioned charge, and to the second mentioned charge as libelled; and sentence of twelve months' imprisonment was pronounced upon each of them.

1884.

No. 62.

David  
M'Gregor  
and Another,High Court,  
July 21.Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, (B) 3  
and (A) 5.

DAVID M'GREGOR, wool broker, and ALEXANDER JAMES PRINGLE, wool broker, were indicted and accused of breach of trust and embezzlement.

AND ALBEIT, by an Act passed in the 43rd and 44th years of the reign of Her Majesty Queen Victoria, chapter 34, entitled 'The Debtors (Scotland) Act, 1880,' it is enacted by the 13th section thereof, that 'The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury for any time not exceeding sixty days, with or without hard labour, (A) in each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud, that is to say, . . . 5. If, within four months next before the presentation of the petition for sequestration or cessio, he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit and has not paid for: . . . (B) In each of the cases following:— . . . 3. If within four months next before the presentation of the petition for sequestration or cessio he by any false representation or other fraud has obtained any property on credit and has not paid for the same: ' YET TRUE IT IS AND OF VERITY, that

on the said David M'Gregor and Alexander James Pringle are, both and each or one or other of you, guilty of the said crime of breach of trust and embezzlement, and of the statutory crimes and offences set forth in sub-section (B) 3 and sub-section (A) 5 of the 13th section of the statute above libelled, or of one or other of them, actors or actor, or art and part: IN SO FAR AS (1.), you the said David M'Gregor and Alexander James Pringle having, from November 1875 to the 22d day of January 1884, during the greater part of that period, carried on the business of wool brokers and wool merchants in or near Easter Road, Leith, under the firm of M'Gregor & Pringle, of which firm you were the sole partners, and the persons named and designed in the first column of Schedule No. I. hereto annexed and referred to having, during the years 1882 and 1883, consigned certain quantities of wool, belonging to or held by them respectively, to you or to your said firm of M'Gregor & Pringle, in order that you or your said firm, as wool brokers foresaid, might sell the same on commission, and account for and pay the prices which you might receive for the same, less all usual and necessary charges and commission, to the said persons respectively; and it being your duty, as wool brokers foresaid, and according to the trust reposed in you by said persons respectively in consigning said wool to you as aforesaid, on selling said wool, or any part thereof, to advise the sale or sales thereof forthwith to the person or persons by whom the wool sold had been consigned, and to remit to him or them the proceeds of such sale or sales, less charges and commission, within twenty-one days thereafter; and you or your said firm having sold the whole or part of the wool consigned to you as aforesaid by the said persons named in the said first column of said schedule respectively, on or about the dates set in the second column of said schedule opposite said names respectively, and having received as the prices thereof the sums set in the third column of said schedule opposite said names and dates respectively, you did not forthwith, according to your duty and trust as aforesaid, advise the said sales, nor at any time remit the proceeds thereof, under deduction of charges and commission, to the persons who had respectively consigned the said wool to you, but you the said David M'Gregor and Alexander James Pringle did, both and each or one or other of you, on or about the respective dates set in the fourth column of said schedule, in or near the premises in or near Easter Road, Leith, then occupied by you, or by your said firm of M'Gregor & Pringle, as your place of business, or elsewhere to the prosecutor unknown, wickedly and feloniously, and in breach of the trust reposed in you as aforesaid, embezzle and appropriate to your own uses and purposes

1884.

No. 62.  
David  
M'Gregor  
and Another.

High Court,  
July 21.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, (B) 3  
and (A) 5.

1884. the several sums of money set in the fifth column of said  
 No. 62. schedule opposite the said dates in the fourth column thereof  
 David respectively, the said last mentioned sums being the net  
 M'Gregor proceeds, after deduction of charges and commission, of the  
 and Another. respective sales made by you as aforesaid, amounting the said  
 High Court, sums so embezzled in all to the sum of £722, 8s. 9d. or thereby :  
 July 21.  
 Cont. of LIKEAS (2.), you the said David M'Gregor and Alexander James  
 Debtors Pringle, and your said firm of M'Gregor & Pringle, having, in or  
 (Scotland) about the month of December 1883 and January 1884, been  
 Act, 1880, insolvent and wholly unable to meet your liabilities, and your estates  
 sec. 13, (B) 3 and the estates of your said firm having, on 5th February 1884,  
 and (A) 5. been sequestrated on your own petition, and declared to belong to  
 your creditors, and Frederick Walter Carter, chartered accountant  
 in Edinburgh, having been elected trustee thereon, on 13th, and  
 confirmed by the Sheriff of the Lothians and Peebles on 18th  
 February 1884, which sequestration still subsists, you and your firm  
 being debtors therein ; and you the said David M'Gregor and  
 Alexander James Pringle having, both and each or one or other of  
 you, formed a felonious and fraudulent scheme of obtaining large  
 quantities of wool from wool merchants, woolstaplers, and others on  
 credit, without paying and intending not to pay therefor, and of  
 immediately selling or disposing otherwise of the said wool, and of  
 paying with the proceeds thereof various persons from whom you or  
 your said firm had received consignments of wool for sale on com-  
 mission, which wool you had sold, and the proceeds of which sales  
 you had duly received but had retained and failed to account for,  
 and also of paying debts due by you, or one or other of you, to  
 certain of your near relatives and friends, you did, both and each or  
 one or other of you, in pursuance of your said felonious and fraudu-  
 lent scheme, between the several dates set in the first column of  
 Schedule No. II. hereto annexed and referred to and the several  
 dates set in the second column of said Schedule No. II. opposite the  
 said dates in the first column thereof respectively, or about these  
 respective periods, the whole of said periods being within four  
 months next before the presentation of your said petition for  
 sequestration, in or near your place of business above libelled or  
 elsewhere to the prosecutor unknown, fraudulently order and *obtain*  
*on credit* from the persons and firms respectively named and designed  
 in the third column of said Schedule No. II. the several quantities  
 and descriptions of wool specified in the fourth column thereof  
 opposite said dates and names respectively, and which were invoiced  
 to you by the said persons or firms respectively on or about the said  
 respective dates set in the said second column of said Schedule  
 No. II., and duly forwarded to and received by you shortly there-  
 after, the value of the said wool so obtained by you amounting to

the sum in all of £12,279, 11s. or thereby, by falsely and fraudulently representing and pretending to each of the said last mentioned persons and firms respectively, and inducing them to believe, contrary to the fact, that you the said David M'Gregor and Alexander James Pringle, and your said firm, were solvent and well able to pay for all the wool ordered by you, and that the orders therefor were given by you in the ordinary course of your business and for the ordinary and lawful purposes thereof, and that you would pay the prices of said wool respectively in cash in fourteen days, or within a similar short period after the same had been invoiced to you; you, well knowing that you were then insolvent, *and intending not to pay* for the said wool, but on obtaining the same, forthwith to sell or otherwise dispose thereof, and to apply the proceeds in pursuance of your said felonious and fraudulent scheme as aforesaid; and you having, in manner above libelled, fraudulently obtained from the said last-mentioned persons and firms respectively the respective quantities and descriptions of wool above libelled, you did not pay and have not since paid therefor, but you did, in pursuance of your said felonious and fraudulent scheme, forthwith sell or otherwise dispose of the same, or of the greater part thereof, and with the proceeds, or part of the proceeds, pay the several persons named and designed in the first column of Schedule No. III. hereto annexed and referred to,—being persons who had consigned wool to you the said David M'Gregor and Alexander James Pringle, or to your said firm, for sale on commission, which wool you had sold at different times between the 1st day of November 1882 and the 1st day of November 1883, and the proceeds of which sales you had duly received but had retained and failed to account for,—the sums set in the second column of said Schedule No. III. opposite the said names in the first column thereof respectively, and amounting to the sum in all of £5680, 15s. 6d. or thereby, and also pay the several persons named and designed in the first column of the Schedule No. IV. hereto annexed and referred to, being near relatives and friends of you the said David M'Gregor and Alexander James Pringle, or of one or other of you, the sums set in the second column of said Schedule No. IV. opposite the said names in the first column thereof respectively, and amounting to the sum in all of £5985, 2s. or thereby: LIKEAS (3), on the 18th and 19th days of January 1884, or on one or more of the days of that month, or of December immediately preceding, or of February immediately following, being within four months next before the presentation of your said petition for sequestration, in or near your place of business above libelled, and in or near the premises in or near Bonnington, Edinburgh, then and now or lately occupied by the firm of White, Burns & Company, wool merchants and skimmers

1884.

No. 62.  
David  
M'Gregor  
and Another.

High Court,  
July 21.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, (B) 3  
and (A) 5.

1884.  
 No. 62.  
 David  
 M'Gregor  
 and Another.

High Court,  
 July 21.

Cont. of  
 Debtors  
 (Scotland)  
 Act, 1880,  
 sec. 13, (B) 3  
 and (A) 5.

there, or in one or other of said places, you the said David M'Gregor and Alexander James Pringle did, both and each or one or other of you, pledge or dispose of, otherwise than in the ordinary way of trade, certain parcels of wool weighing in all 52,450 lbs. or thereby, being portions of the wool which you had obtained on credit as above libelled, and had not paid for, the quantities or descriptions of said parcels of wool so pledged or disposed of, and the names of the persons or firms from whom the same were obtained by you, being specified in the first and second columns respectively of Schedule No. V. hereto annexed and referred to, by handing over the same, along with three other small parcels of wool weighing in all 1642 lbs. or thereby, to the said White, Burns & Company, on an advance of, or in exchange for, the sum of £1985, 12s. 1d. handed to you, or to one or other of you by the said White, Burns & Company, upon the arrangement that you or your said firm should have right to redeem the said parcels of wool handed over to the said White, Burns & Company as aforesaid, within three months from the said 18th or 19th of January 1884, on repayment to the said White, Burns & Company of the said sum of £1985, 12s. 1d., with the addition of a penny for each pound weight of said wool as profit, commission, or other consideration to them on the said transaction ; and this you the said David M'Gregor and Alexander James Pringle, both and each or one or other of you, did, with intent to defraud your creditors, or one or more of them. And you the said David M'Gregor and Alexander James Pringle having been apprehended, &c.

The panels being interrogated on the libel, they respectively pleaded guilty to the second charge as libelled, viz., the charge under section 13 (B) 3 of the Debtors (Scotland) Act, 1880, with regard to the wool obtained from the following parties specified in Schedule II. appended to the indictment, viz., William C. James, A. & J. M. Jackson, Smethurst Brothers & Ingham, B. Chaffey & Company, and W. & T. Johns, *quoad ultra* not guilty of the second charge ; as also they respectively pleaded guilty of the third charge as libelled, viz., to the charge under said 13th section (A) 5, and not guilty of the first charge, viz., the charge of breach of trust and embezzlement.

The total sums charged in the indictment being nearly £8700, and the pleas of guilty tendered being

admissions with regard to transactions involving nearly £5000, the public prosecutor accepted the pleas.

The Court pronounced sentence of twelve months' imprisonment upon each accused.

1884.

No. 62.  
David  
M'Gregor  
and Another.

High Court,  
July 21.

Cont. of  
Debtors  
(Scotland)  
Act, 1880,  
sec. 13, (B) 3  
and (A) 5.

## NORTHERN CIRCUIT.

### INVERNESS.

Present,

LORD MURE.

PETER HIGGINS, Appellant—*J. C. Thomson.*

AGAINST

THE EARL OF MORAY, Respondent—*Mackay.*

PROCEDURE IN PROSECUTION FOR PENALTIES BEFORE SHERIFF UPON COMPETING CIVIL RIGHTS—COMPETING CIVIL RIGHTS—SALMON FISHINGS—JURISDICTION.—In a prosecution for penalties before a Sheriff, under the Salmon Fisheries Acts, the accused maintained that, as a member of the Royal Burgh of Forres, he had a right to fish for salmon at the place libelled, and produced a royal charter in favour of the Burgh of the water and fishings in Findhorn; with all the fisheries, fishes, mussells, and mussel-scalps, and all the other fishings, possessions, and liberties which of old pertained, or were known to have pertained to the Burgh and community thereof. No evidence of possession on this charter was led, and the Sheriff convicted "in respect of the evidence adduced," and imposed a fine of twenty shillings and expenses.

Held, in an appeal to the Circuit Court, that as a question of competing rights had been relevantly raised, the procedure before the Sheriff ought either to have been sisted or the complaint dismissed, leaving parties to their remedy in the appropriate Civil Court, and the conviction therefore recalled.

PETER HIGGINS, a baker in Forres, was charged upon a complaint, at the instance of the EARL OF MORAY, in the Sheriff Court at Elgin, with two offences within the meaning of the statute 9 Geo. IV., c. 39 (Salmon Fishing Act, 1828), and 7 and 8 Vic., c. 95 (the Salmon Fisheries Act, 1844), and particu-

No. 63.  
Higgins  
v.  
The Earl of  
Moray.

Inverness,  
Sept. 9.

Appeal.



1884.  
 No. 63.  
 Higgins  
 v.  
 The Earl of  
 Moray.  
 Inverness,  
 Sept. 9.  
 Appeal.

larly the first section of the last mentioned act [which imposes penalties upon persons who, without a legal right or permission from the proprietor, take or attempt to take salmon or fish of the salmon kind], in so far as on two occasions in the month of March, at two different places on the Findhorn, 'he did unlawfully and wilfully take, fish for, or attempt to take one or more salmon grilse, sea trout, whittling, or other fish of the salmon kind in' here follows the (*locus*) 'and that by means of rod and line and artificial fly, not having a legal right or permission from the complainer the Earl of Moray.'

The latter produced a Crown Charter in his favour, dated 13th August 1872, and also led evidence of prescriptive possession by net and coble.

The respondent, on the other hand, produced a Crown Charter of date 23rd June 1496, in favour of the burgesses and community of Forres, and averred that the *loci* in the complaint are within the limits of the grant therein, and that the burgh of Forres had paid the red-dendo therein up to the present time. In the charter the king gave, granted, and confirmed to the said burgesses and community certain lands, &c., 'as also the waters, fishings, emoluments, and liberties underwritten viz., the lands,' &c., 'as also the water and fishing of Findhorn, both in the fresh water and the salt, with all the fisheries, fishes, mussels and mussel-scalps, and the other fishings, possessions, and liberties which of old pertained, or are known to have pertained, to our foresaid burgh and community thereof, and also with power to the said burgesses of letting said water, and of fishing and working upon the same in whatever part they please within the foresaid bounds with boats and nets.' It was stated that the respondent had been openly fishing in the daytime in reliance on his right under the above charter as one of the community of Forres, and that although the charter was sufficient to confer a right of salmon fishing without any possession (which right could not be lost *non utendo*); but as the burgesses had exercised



their right, the respondent's agent moved the Sheriff for delay that inquiries might be made into the nature and extent of possession had upon this title, which was refused. And evidence having been thereupon led in support of the complaint, the Sheriff, 'in respect of the evidence adduced,' convicted the respondent of the offences charged, and fined him in the sum of ten shillings for each salmon, together with one pound eight shillings of expenses ; and in respect these sums had been paid under reservation of the respondents' right of review, found it unnecessary to issue any warrant.

Higgins thereupon appealed to the next Circuit Court to be held at Inverness, under the Heritable Jurisdictions Act, and pleaded :—that he was aggrieved in respect that neither the respondent nor anyone legally authorised to do so appeared in support of said complaint :—that the complaint and proceedings were incompetent and irregular, as being an attempt to have a question of patrimonial right determined in a prosecution under penal statutes :—that he, the appellant, had a colourable title to fish for salmon with rod and line in virtue of (1) the foresaid charter in favour of the burgh and community of Forres ; (2) the said charter and unchallenged exercise of salmon fishing by the only competent mode in the circumstances beyond the memory of man by the said burgesses and community of the burgh of Forres.

It was also stated and pleaded in a Minute lodged for the appellant that the burgh of Forres 'had for forty years and upwards prior to the raising of the present proceeding, exercised a right of salmon fishing in the river Findhorn by net and coble, wherever that mode of fishing was practicable, and by rod and line or other recognised mode of fishing salmon where the use of net and coble was not practicable. The appellant's pleas founded on the terms of the charter, apart from the possession, being always preserved.'

At the hearing before the Circuit Court, the appellant contended that a colourable title having been produced,

1884.

No. 63.  
Higgins  
v.The Earl of  
Moray.Inverness,  
Sept. 9.

Appeal.

1884. the Sheriff was bound to abstain from convicting, and cited  
 No. 63. *M'Phail v. Neilson*, 20th Nov. 1837, Swint., vol. i., p.  
 Higgins v. 583; *Stevenson v. M'Donald*, Glasgow, 28th Sep. 1855,  
 The Earl of Irv., vol. ii., p. 239; *Barlas v. Chalmers*, Perth, 4th Apr.  
 Moray. 1876, Couper, vol. iii., p. 279. It was also maintained  
 Inverness, that it was not necessary that the right of salmon fishing  
 Sept. 9. should be always exercised by net and coble, as in many  
 Appeal. portions of streams this mode of fishing was impractic-  
 able or unprofitable; and further that in the case of a  
 burgh, the authorities might find it more expedient to  
 afford amusement and recreation by rod fishing to the  
 inhabitants, than to increase the revenue of the burgh  
 by fishing the stream by net and coble.

LORD MURE.—There is no objection taken to the competency of this appeal, and the question raised resolves mainly into one of procedure, viz., as to what, under circumstances such as those which here occur, and having regard to the relative averments of parties, is the proper course to pursue in dealing with a complaint or prosecution for penalties under the acts founded on.

Now, this as it appears to me is no longer an open question; for the rule acted on in at least three reported cases, referred to at the discussion—those of *M'Phail v. Neilson* in 1837, *Stevenson v. Macdonald* in 1855, and *Barlas v. Chalmers* in 1876, seems to be that whenever under a complaint of this description a legal right to fish is set up and relevantly averred in defence, and the question raised is thus resolved into one of competition, relative to a civil right, the proper course to adopt is either to sist the complaint till the issue of the civil action, if such an action is in existence; and, if no such action has been raised, then, to dismiss the complaint—leaving it to the parties to take the necessary steps for having the civil right tried deliberately in a competent Court; because the Sheriff Court is not competent to deal with it.

This is a safe and salutary rule, and one which ought not to be disregarded in any similar case: and as I can

see no substantial difference between the averments admittedly made by the appellant in this case before the Sheriff-substitute at the time an adjournment of the case was refused, and which have been amended on appeal, and those upon which the Court proceeded in the cases of Stevenson and of Barlas, I have deemed it right to adhere to the course adopted in those cases: and that without offering any opinion on the merits of the questions raised on the terms and effect of the title and of the possession which is alleged to have followed upon those titles.

1884.  
 No. 63.  
 Higgins  
 v.  
 The Earl of  
 Moray.  
 Inverness,  
 Sept. 9.  
 Appeal.

The following was the Interlocutor:—

‘ Lord Mure, one of the Lords of Justiciary, having heard parties’ procurators, Recalls the conviction and sentence complained of: Finds the Respondent in the Appeal liable in expenses; modifies the same to five guineas, for which, and the dues of extract, decerns against the respondent.’

Agents for Appellant—ROBERT STEWART, S.S.C., and WM. PAUL, Solicitor, Forres.  
 Agents for the Respondent—Messrs MELVILLE & LINDSAY, W.S.

## WESTERN CIRCUIT.

INVERARAY.—AUTUMN 1884.

Present,

The LORD JUSTICE-CLERK.

HER MAJESTY’S ADVOCATE—*R. Vary Campbell, A.-D.*

AGAINST

ARCHIBALD GRASSOM—*M’Kechnie.*

AND

JAMES DRUMMOND—*M’Lennan.*

**CULPABLE AND RECKLESS NEGLECT OF DUTY BY PERSONS IN CHARGE OF A STEAM VESSEL NAVIGATING A PUBLIC HARBOUR—MASTER AND MATE—PRESUMPTION WHEN A STEAM VESSEL RUNS DOWN A BOAT AT ANCHOR—INDICTMENT—RELEVANCY.**—An indictment charging the master and mate of a steam vessel with culpable and

reckless neglect of duty while navigating the vessel in a public harbour. Objection, that the minor proposition was not sufficiently specific, and especially that it did not distinguish the respective duties of master and mate, repelled.

Observed *per* The LORD JUSTICE-CLERK, that when a steam vessel in motion comes into collision with a stationary vessel, and particularly with a vessel at anchor during daylight, there is a presumption that the former was negligently managed.

1884. ARCHIBALD GRASSOM, now or lately master of the  
 No. 64. steam vessel *Meteor* of Grangemouth, and JAMES  
 Archibald BOYLE *alias* JAMES DRUMMOND, now or lately prisoners  
 Grassom and in the prison of Campbeltown, were indicted and  
 James accused of the crime of culpable and reckless neglect of  
 Drummond. duty, by any person or persons in charge of, or employed  
 Inveraray, on board of any steam vessel navigating a public har-  
 Sept. 30. bour, or other public place of navigation, whereby there  
 Culpable and is occasioned injury to the person and danger to the life  
 Reckless of any of the lieges.  
 Neglect of Duty.

IN SO FAR AS, on the 11th day of August 1884, or on one or other of the days of that month, or of July immediately preceding, you the said Archibald Grassom and James Boyle *alias* James Drummond, being in charge of or employed on board of the steam vessel *Meteor* of Grangemouth, then starting and navigating under steam outward from Campbeltown, in the county of Argy on a voyage to Leith, you the said Archibald Grassom being employed as master, and in command of the said steam vessel, and you the said James Boyle *alias* James Drummond being employed as mate of the said steam vessel; and it being the duty of you the said Archibald Grassom as master, and in command of said steam vessel, to direct, manage, and steer it, or cause it to be managed and steered, with due care and caution, and with a due regard to the safety of any small boat or other vessel engaged in fishing, and likely to be met with in navigating outward from Campbeltown, and of the persons in or on board of such small boat or other vessel, and it being your duty for this purpose to keep, or cause to be kept, a good look-out from the said steam vessel, so as to avoid collision with such small boat or other vessel; and it being the duty of you the said James Boyle *alias* James Drummond, as mate of the said steam vessel, to assist the said Archibald Grassom in the performance of his duties as aforesaid, and in particular to keep a good look-out from the said steam vessel, so as to avoid collision with such small boat or other vessel as is above mentioned; Yet

NEVERTHELESS, you the said Archibald Grassom and James Boyle *alias* James Drummond did, both and each or one or other of you, time above libelled, in Campbeltown Loch, in the parish of Campbeltown, and county of Argyll, and within the limits of the harbour of Campbeltown, and near the Black Beacon in or near said Loch, culpably and recklessly, in breach of your respective duties as master and mate aforesaid, neglect to direct, manage, and steer the said steam vessel, or to cause it to be managed and steered with due care and caution, and with a due regard to the safety of any small boat or other vessel engaged in fishing, and likely to be met with in navigating outward from Campbeltown, and of the persons in or on board of such small boat or other vessel, and did neglect to keep, or cause to be kept, a good look-out from said steam vessel, so as to avoid collision with such small boat or other vessel, and in consequence of the culpable and reckless neglect of duty, on the part of both and each or one or other of you as above libelled, the said steam vessel then under your charge, or in which you were then employed as master and mate respectively as aforesaid, did, time and place above libelled, strike on the port side, or on some other part to the prosecutor unknown, and did sink, upset, or run down a small boat or other vessel, at anchor, having in or on board of the same William M'Taggart, artist, now or lately residing in or near Charlotte Square, Edinburgh, and then residing at or near Glenramskill, in the parish of Campbeltown, and county foresaid, Mary Holmes or M'Taggart, his wife, Hugh Holmes M'Taggart and William Dugald M'Taggart, his sons, all then residing with him at or near Glenramskill aforesaid, and Thomas Young, tailor and clothier, now or lately residing at Joppa, in the parish of Duddingston, and county of Edinburgh, and then residing at Kilkerran, in the parish of Campbeltown, and county foresaid, who had all, or some of them, been engaged in fishing at the place above libelled in the said small boat or other vessel; by all which, or part thereof, the said William M'Taggart, Mary Holmes or M'Taggart, Hugh Holmes M'Taggart, William Dugald M'Taggart, and Thomas Young, were all immersed in the sea at the place above libelled, and were, all and each or one or more of them, injured in their persons, and put in danger of their lives: And you the said Archibald Grassom having been apprehended, &c.

1884.

—  
No. 64.  
Archibald  
Grassom and  
James  
Drummond.

Inveraray,  
Sept. 30.

Culpable and  
Reckless  
Neglect of  
Duty.

M'LENNAN, for the panel Drummond, objected to the relevancy, that while the major charged the crime of neglect of duty, there was no specification in the narrative which could enable anyone to discover what specific breach of duty it was that was the basis of this charge.

1884. The libel, in order to be relevant, should have specified the exact terms in which the panels were responsible for the accident which had occurred, while, on the contrary, it just stated in a general way that they were guilty of neglect of duty. Further, the respective duties of the two panels were so slumped together in the indictment that it was impossible to discover what the prosecutor proposed to prove against each of the panels. It was not clear against which of the panels the several averments of neglect of duty were directed, nor was it clear what several duties were incumbent on the master and the mate respectively. The indictment in the similar case of *Thomas Houston and James Ewing*, Glasgow, April 23, 1847, Arkley, p. 252, was specific in its averments of duty against each of the prisoners. So, too, was the indictment in the *Orion* case, *Thomas Henderson and others*, High Court, Augt. 29, 1850, J. Shaw, 394. The charges were clearly and distinctively specified in those cases, and should have been so stated in the present case. Further, with reference to the case of the mate, his duty was libelled as to assist the master in performing certain acts, and yet the charge of neglect of duty went further than that, for it laid on the mate the principal charge of the vessel in the same way as if he had been master, so that a conviction under this indictment would fix upon the mate the neglect of a duty greater than that with which he had been charged.

M'KECHNIE, for the panel Grassom, objected to the relevancy that while the indictment sets forth that certain general duties were incumbent upon both master and mate, it also sets forth that it was the duty of the mate specially to keep a look-out. If that was a special duty of the mate's, why was the master charged with neglect of it? Further, if it was the want of a look-out that was the criminal neglect charged against him, the libel should have stated that it was in consequence of the want of a look-out that the accident occurred. But the libel did not do so. It did not render evident what was regarded

No. 64.  
Archibald  
Grassom and  
James  
Drummond.  
Inveraray,  
Sept. 30.  
Culpable and  
Reckless  
Neglect of  
Duty.

as the cause of the accident. Was it the want of a look-out? Was it bad management? Was it careless steering? The Crown must state what it intended to prove. It was a perfect example of a *non sequitur* to say, as the indictment said, that 'in breach of the duty above libelled,' the events happened which are narrated. This was not a kind of case in which loose libelling should be allowed, because accidents of the kind in question put seafaring men in considerable risk, and it was of the utmost importance to them that they should know precisely what duty it is that they have neglected. Though there had been many cases arising out of accidents similar to that which gave rise to the present charge, this was probably the only case of the kind brought to trial in which there had been no loss of life.

R. V. CAMPBELL, *A.-D.*, for the prosecution replied.—The libel charges a simple case of a boat's having been run down while at anchor through the neglect of the panels to keep a look-out. In such circumstances, *i.e.*, when a boat at anchor and a vessel under way come into collision, a presumption of law arises that the boat which came in contact with a stationary boat was culpably managed. See the opinion of Lord Neaves in the case of *Angus Macpherson and John Stewart*, Inverness, 24th Sept. 1861, *Irv.*, vol. iv., p. 85.

The LORD JUSTICE CLERK.—This is an indictment against both prisoners for not keeping a good look-out, and it states that it was the duty of both of them to have this done. The words in the indictment describing generally the duty of both the prisoners to navigate the vessel must be read in relation to the only specification to be found of this duty, and that is to keep a proper look-out. It is said that this not having been done, the result followed as stated in the indictment. I see no objection to the libelling of the charge.

The objections to the relevancy were accordingly repelled and the libel found relevant.

It appeared from the evidence that on the evening of

1884.

No. 64.  
Archibald  
Grassom and  
James  
Drummond.

Inveraray,  
Sept. 30.

Culpable and  
Reckless  
Neglect of  
Duty.



1884. the day libelled, a boat, in which were Mr and Mrs  
 No. 64. William M'Taggart, their two sons, and Mr Thomas  
 Archibald Young, was anchored at the entrance to Campbeltown  
 Grassom and Harbour, at a point where it was usual for boats to lie  
 James at anchor in the fishing ground, and where there was  
 Drummond. more than ample room for a large vessel to pass on  
 either side. About half-past five o'clock, the occupants  
 Inveraray, of the boat saw the *Meteor* leave Campbeltown Harbour  
 Sept. 30. and come 'dead on' to them. They shouted when the  
*Meteor* was about 120 yards off; but in a few seconds  
 Culpable and the boat was struck amidships by the stem of the  
 Reckless *Meteor*, and its occupants were immersed, the *Meteor*  
 Neglect of passing over them, and bruising some of them more  
 Duty. or less severely. All the occupants of the boat were  
 eventually picked up and brought ashore.

It appeared further, that when the *Meteor* left Campbeltown Harbour, there were four persons on board, the master, who was at the tiller, steering the vessel; the mate, who was forward, near the mast; a deck-hand, who was engaged in putting things to rights on deck; and the engineer, who immediately went below to see to his engine. The vessel being in ballast and light, her stem stood out of the water at a higher level than her stern, so that the man at the tiller could not see what was ahead of the vessel. When the vessel was some way out, the deck-hand asked the mate to assist him in battening down the hatches. The mate did so, and immediately afterwards the small boat was run down. The *Meteor* was at once stopped, and those on board did their utmost to render assistance to the party in the small boat.

THE LORD JUSTICE-CLERK, in charging the Jury, said:—This is a painful case, because there is a large amount of sympathy with men of hitherto stainless character, who are rendered responsible for accidents of this kind; yet at the same time, the fact that this accident did not result in loss of life is an element of good luck for the prisoners. This case requires no

special knowledge of law for its decision. If in a common-sense view of the circumstances, you should come to the conclusion that this accident was the result of negligence, that negligence is criminal. Now, it is certain that where one vessel is in a position in which motion is difficult, and another vessel is in a position in which motion is easy, and a collision occurs, there are certain presumptions of negligence which may be urged against one of these vessels, as, for example, a sailing vessel which comes into collision with one at anchor, or a steamship which comes into collision with a sailing vessel during a calm. No vessel is entitled to go out of such a harbour as that of Campbeltown without knowing what is in front of her. We do not need the evidence of experts to support that proposition. It is common sense. I think it is certain from the evidence that this vessel was being navigated without a look-out. The facts speak for themselves, it was in broad daylight, and this boat was and must have been visible from the time the *Meteor* started. If there had been a look-out kept they must have known that this boat lay in their way. They did not know what was in front of them. There is no difficulty as to that.

The difficulty lies in the question, who is responsible? The master or the mate? Either or both? If you are satisfied that from beginning to end of this affair, the small boat was never seen from on board the *Meteor*, then in no view of the case can the master be free from blame. He must have known that there was no look-out, and that there had been none. It is in vain to say that he could trust to his crew to have a look-out kept. He could see what was being done. It is no palliation that the accident took only two minutes. If you are satisfied that during those two minutes there was no look-out, then that will involve the master in responsibility. That is the master's case.

As to the mate's it must be left largely to you. It has been proved that the mate was fastening the hatches im-

1884.

---

 No. 64.  
 Archibald  
 Grassom and  
 James  
 Drummond.

---

 Inveraray,  
 Sept. 30.

---

 Culpable and  
 Reckless  
 Neglect of  
 Duty.

1884. mediately before the accident took place ; and, if that is  
 No. 64. so, it ends all question as to whether there was a look-  
 Archibald out or no. But it is said that the mate was entitled to  
 Grassom and do this, that it was his duty to do this and not to keep  
 James a look-out. Now, if the mate was told to keep a look-  
 Drummond. out, he did not obey orders. If he was not told to do  
 Inveraray, so, he knew that there was no look-out, and that, the  
 Sept. 30. master being at the wheel, it was his duty to see to the  
 Culpable and safe navigation of the vessel.  
 Reckless  
 Neglect of  
 Duty.

With these remarks I leave the case in your hands as one eminently fitted for you to deal with. The prisoners here had clearly no intention to do any injury to any one ; but you cannot but see by what a hairsbreadth this case has fallen short of a tragedy.

The Jury, by a majority returned a verdict of guilty as libelled against the prisoners ; but recommended them to the leniency of the Court

The panels were sentenced to imprisonment ; Grassom for three months, and Drummond for two months.

C. ALEXANDER, Writer, Grangemouth—Agent for Grassom.  
 C. Y. JOHNSTON, Writer, Falkirk—Agent for Drummond.

---

## STIRLING.

Present,

The LORD JUSTICE-CLERK.

HER MAJESTY'S ADVOCATE—*R. V. Campbell, A.-D.*

AGAINST

GEORGE BROADLEY—*Wm. Campbell.*

CULPABLE HOMICIDE.—If a person is engaged in an unlawful act, or in the discharge of a lawful act in an unlawful way, and the death of another is the result, that in the abstract amounts to culpable homicide, even although the fatal result was mainly due to a combination of extraneous circumstances, and would not or might not, but for these extraneous circumstances, have happened.

GEORGE BROADLEY, from the prison of Glasgow, was indicted and accused of the crime of culpable homicide.

1884.

No. 65.  
George  
Broadley.

IN SO FAR AS, on the 16th day of August 1884, or on one or other the days of that month, or of July immediately preceding, on board of the lighter or scow *Bella* of Glasgow, then lying near the public quay in the harbour of Dumbarton, you did, wickedly and feloniously, attack and assault the now deceased Robert Mason, a boatman of the said lighter or scow *Bella* and did strike him one or more blows on or near the head or other parts of his person, and did struggle with him, and did push or knock him overboard of said lighter or scow into the water in said harbour, in consequence whereof the said Robert Mason was drowned, and was thus culpably bereaved of life by you the said George Broadley: and you the said George Broadley having been apprehended, &c.

Stirling,  
October 3.

Culp. Hom.

There was no objection taken to the relevancy, and the panel having pleaded not guilty, the case went to trial.

From the evidence it appeared that the panel and the deceased, two seamen on board the lighter *Bella* lying at the quay in the harbour of Dumbarton, were heard quarrelling between ten and eleven at night on the date libelled while both were very drunk in the cabin, and cries of murder were heard to proceed from there. While the deceased was standing on the hatchway at a part of the deck which was only two and a half feet broad on each side of the hatchway, the panel was seen to come on deck, and to strike or push the deceased on the chest with one hand, whereupon the latter overbalanced himself and fell into the water, the lighter having no gunwale. Thereupon the panel, while in the act of attempting to get a boat-hook, fell into the water; and notwithstanding the efforts of others, Mason sank and was drowned. There was no evidence as to what the quarrel was about.

The Advocate-Depute and counsel for the panel having addressed the Jury,

THE LORD JUSTICE CLERK in charging the Jury, after observing that culpable homicide was a crime which varied in degree, verging on the one hand upon the

14.  
No. 66.  
George  
Wedley.  
Stirling,  
October 2.  
Julp. Hom.

confines of murder, and on the other upon which be designated as culpable misadventure, commented upon the facts and said—There is no doubt about the law applicable to the case. If a person is engaged in an unlawful act, or in the discharge of a lawful act in an unlawful way, and the death of another is the result of that act, that is in the abstract culpable homicide even although the fatal result was mainly due to a combination of extraneous circumstances, and would not, or might not, but for these extraneous circumstances, have occurred.

The Jury returned a verdict of not proven.

## HIGH COURT.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE—*Brand, A.-D., and Mackay, A.-D.*

AGAINST

JOHN BETHUNE WALKER LEE—*Dean of Faculty (Macdonald) and Rhind.*

AGENT AND CLIENT—THEFT—BREACH OF TRUST AND EMBEZZLEMENT.—Held that where an Agent is entrusted by a client with deposit receipt for the purpose of investing the proceeds thereof the Agent is not entitled to uplift the money before the investment is ready, and mingle the amount received with his own funds without the consent of his client: and that where the agent so acts, and is charged with breach of trust and embezzlement the question for the jury is whether the circumstances prove disclose a guilty intention on his part to appropriate the money to his own purposes.

JOHN BETHUNE WALKER LEE, S.S.C., was indicted accused of the crime of theft; as also breach of trust and embezzlement.

No. 66.  
J. B. Walker  
Lee.

High Court,  
Oct. 20.

Breach of  
Trust and  
Embez.

IN SO FAR AS, you having, at the dates after libelled, and time prior to the first of these dates, carried on business as a law agent and solicitor before the Supreme

Scotland, and you having been employed as law agent by Helenora Livingston or March, widow, now or lately residing in or near Brighton Terrace, Joppa, in the parish of Duddingston, and county of Mid-Lothian, and you having, on various occasions between the 23d and 29th days of May 1884, represented to the said Helenora Livingston or March that you could lend £800 sterling on her behalf upon heritable security at  $4\frac{1}{2}$  per cent. per annum, over two houses in or near Hillside Crescent, Edinburgh, the property of, &c. ; and you having on or about the 24th day of May 1884, submitted to her a written proposal for the said loan, and containing the particulars of the security therefor, and she having agreed so to lend the said sum, and having employed you as her law agent for that purpose, you having undertaken to carry through the same, and she having in consequence of the foresaid representations, on or about the 28th day of May 1884, in or near the house in or near Brighton Terrace aforesaid then and now or lately occupied by her, delivered to you, as law agent aforesaid, and entrusted you with a deposit receipt by the National Bank of Scotland Limited, Portobello, in her favour, for £800 sterling, dated 27th December 1883, endorsed by her for the purpose of enabling you to uplift the proceeds thereof, and to lend therefrom the said sum of £800 for her, when so uplifted, to the said William Shaw, on the security of the foresaid houses, and you having received the said deposit receipt accordingly, and having, on or about the 29th day of May 1884, in or near the office or premises of the National Bank of Scotland Limited, in or near Portobello, uplifted and received payment of the proceeds of the foresaid deposit receipt, by obtaining a draft for £800, in your own name, on the National Bank of Scotland Limited, Edinburgh, and the contents of which draft you caused to be placed to your credit in an account current kept by you with the Royal Bank of Scotland, Edinburgh, as part of a sum of £806, 3s. 8d., and the interest which had accrued on the said deposit receipt, amounting to £7, 2s. 6d., you caused to be placed to the credit of the said Helenora Livingston or March in her account current with the said National Bank of Scotland Limited, Portobello, you the said John Bethune Walker Lee did fail so to lend the said sum of £800, and did, on the 29th day of May 1884, or on one or other of the days of that month, or of June immediately following, in or near the said office or premises of the National Bank of Scotland Limited, in or near Portobello, or in or near the office or premises of the Royal Bank of Scotland in or near St Andrew Square, Edinburgh, or in or near the office or premises in or near George Street, Edinburgh, then occupied by you, wickedly and feloniously steal and theftuously away take the proceeds of a deposit receipt for the sum of £800, as aforesaid the property or in the

1884.

No. 66.

J. B. Walker  
Lee.High Court,  
Oct. 20.Breach of  
Trust and  
Embez.

1884. lawful possession of the said Helenora Livingston or March : or  
 No. 66. otherwise, time and place last above libelled, you the said John  
 J. B. Walker Bethune Walker Lee did, wickedly and feloniously, and in breach  
 Lee. of the trust committed to you as aforesaid, embezzle and appropriate  
 High Court, to your own uses and purposes the said sum of £800 sterling or  
 Oct. 20. thereby, the property or in the lawful possession of the said Helen-  
 Breach of ora Livingston or March : And you the said John Bethune Walker  
 Trust and Embez. Lee having been apprehended, &c.

No objection was taken to the relevancy, and the panel pleaded not guilty.

Evidence was led for the Crown and for the panel, from which it appeared that he had received from Mrs March on 28th May 1884, £800, in the shape of a deposit receipt by the National Bank at Portobello, in her favour, for the purpose of investing the proceeds in an heritable bond over two houses in Hillside Crescent belonging to Mr Shaw, builder, at  $4\frac{1}{2}$  per cent., and that he cashed the deposit receipt the following day, 29th May, and deposited the proceeds in his own account current with the Royal Bank in Edinburgh. That at that time he had a small sum at his credit, but on that same day, after the £800 had been paid in, he drew upon his account, and reduced the balance in his favour to £556, 8s. 2d., and this balance continued to diminish, although small sums were occasionally paid into the account, until on 25th July there was a balance against him of £50, 6s. 2d. It was proved that although the panel had been in correspondence with Mr Shaw's agent as to a loan to be granted over the subjects mentioned in the indictment, no loan had ever been executed. It was also proved, however, that there had been various conveyancing difficulties in the way which had delayed the carrying out of the loan ; and on 2d July Mr Shaw's agent, whose signature was necessary to the bond, in consequence of his having an interest in the subjects, disappeared from Edinburgh. Meanwhile, Mrs March applied frequently to the panel for the bond, and in place of informing her of these difficulties and delays, he repeatedly told her that ' it was at the register awaiting its



turn ;' and in answer to a question by the Court, she said, ' I thought when the panel took away the deposit receipt that he was going to pay it to Mr Shaw at once. That was the impression on my mind from my interviews with the panel.' The expression used, however, by the panel in his correspondence with Mrs March implied that the transaction had not been completed. Having failed to get delivery of the bond from the panel, Mrs March then became apprehensive, and on 6th August called upon him, accompanied by her agent, and demanded that he should either pay the money, or deliver to her the bond. He then offered a bond with security over certain superiorities which belonged to himself, over subjects in the Lawnmarket, the feu-duties upon which amounted to £84 per annum. This was refused. On 12th August her agent put the matter into the hands of the Procurator-fiscal. On 13th August she received from the panel a cheque for £150 ; on the 17th one for £160 ; on the 19th the panel was apprehended, and on the 3rd of September Mrs March received the whole balance of her money, with 4½ per cent. interest. It was proved that subsequent to the tender to Mrs March a loan of £1600 had been obtained by Lee over the subjects in the Lawnmarket, the superiorities over which he had offered as security on 6th August. And valuers were called on his behalf, who deponed that the value of heritable properties pointed out to them, and which, it was deponed, belonged to the panel, after deducting burdens, was between £10,000 and £20,000, and his unsecured debts amounted to about £2000.

The ADVOCATE-DEPUTE contended that Mrs March's evidence as to what passed at the various interviews she had with the panel, and the expressions used by him in correspondence, proved that he had represented to her that the bond had been prepared and got, and that the delay in delivering it was due to a pressure of business at the Register Office, and he cited the case of *Joseph*

1884.

---

 No. 66.  
 J. B. Walker  
 Lee.

---

 High Court,  
 Oct. 20.

---

 Breach of  
 Trust and  
 Embez.

1884. *Dawson Wormald*, High Court, March 27, 1876,  
Couper, vol. iii., p. 246.

No. 66.  
J. B. Walker  
Lee.

High Court,  
Oct. 20.

Breach of  
Trust and  
Embez.

The panel's counsel contended that Mrs March must have been made aware by her communications with the panel that he had uplifted the money in the deposit receipt, and had himself become liable for it, together with interest.

LORD YOUNG in charging the Jury, after stating the facts, said—Now, the prosecutor says that the panel ought not to have uplifted this money until the transaction was complete, and the money was ready to be handed over to the borrower in exchange for the bond. I must tell you that that is the proper view ; the right course for any man of business in such a transaction, whether he is acting as a friend of the lender or as a professional adviser, is not to uplift the money till the investment is ready ; he should never finger the money except as the vehicle to convey it from the lender to the borrower, and above all he should abstain most scrupulously from mingling it with funds of his own. But it does not follow that the man who does so is a thief ; an irregularity of that sort may be, and in fact has been, not unfrequently committed by not dishonest men. It is quite irregular—always assuming it is done without the knowledge and consent of the client—and any man of business who does it exposes himself to a great risk of misrepresentation. But it is a question for the Jury to determine in the whole circumstances of the case, whether by doing so he has committed a theft or breach of trust and embezzlement ; and in determining that question you will have regard to considerations of good sense and moderation, and particularly to this, whether the panel was acting dishonestly, acting with the mind of a thief or a knave, and intending to take his neighbour's property. That is the meaning of the words ' wickedly and feloniously ' which you find in the indictment.

The prosecution here, I must say, seems to me to rest

on a somewhat stern and severe view, for you have a charge of theft brought forward against the panel, although the person whom he is said to have robbed did not lose a farthing, and, indeed, never was in jeopardy of losing a farthing. If the panel had Mrs March's consent to doing what he did, he did not even commit an irregularity. If he had not, I tell you that his conduct was irregular; but I put it as a question for you, do you think his conduct was that of a dishonest man—do you think he acted a dishonest part, and dishonestly converted her money to his own purposes?

The Jury assoilzied the panel.

Agent for the panel—J. B. DOUGLAS, Solicitor.

---

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

JOHN LEISK and ALEXANDER SANDISON, Appellants—  
*Mackintosh and H. Johnston.*

AGAINST

JAMES KIRKLAND GALLOWAY, Respondent—*J. Comrie Thomson*  
*and A. Graham Murray.*

OBSTRUCTION OF STREETS AND ROADS—ROADS WITHIN BURGH  
— POLICE COMMISSIONERS — ROAD TRUSTEES — PROCURATOR-  
FISCAL—STATUTE 25 AND 26 VIC., c. 101, SEC. 251 (General  
Police and Improvement (Scotland) Act, 1862)—STATUTE  
27 AND 28 VIC., c. CXXXIX. (Zetland Road Act, 1864)—  
STATUTE 1 AND 2 WM. IV., c. 43, SEC. 96 (General Turnpike  
Act, 1831)—STATUTE 8 AND 9 VIC., c. 41, SECS. 26 AND 38  
(Highways and Statute Labour Act, 1845)—STATUTE 41 AND  
42 VIC., c. 51, SEC. 122 (Roads and Bridges Act, 1878).—Part  
of a road belonging to a county road trust, constituted under a  
local Act of Parliament, lay within a burgh which had adopted  
the General Police Act of 1862. Under the County Road Act  
the Procurator-fiscal of the county had authority to prosecute  
offenders against its provisions.—Held that the adoption of the

1884.

No. 66.

J. B. Walker  
Lee.

High Court,  
Oct. 20.

Breach of  
Trust and  
Embez.

General Police Act gave the Commissioners of Police a concurrent jurisdiction over the road for the purposes of that Act, but did not exclude the jurisdiction of the County Road Trustees, nor derogate from the title of the Procurator-fiscal of the county to prosecute offenders against the provisions of the County Road Act. The General Turnpike Act of 1831 and the Highways Act of 1845 impose penalties on any person who 'shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon' a turnpike road, 'or on the side or sides thereof, or the footpath or causeways adjoining.' In a complaint brought under a local Road Act which incorporated this provision, two persons were charged with a contravention of it in so far as they, on a day named, placed two boxes on the public road opposite their shop. The evidence shewed that the boxes could not cause any obstruction, and the Sheriff found that no obstruction was proved, but convicted the accused on the ground that the offence consisted in laying anything upon the road.

Held that the essence of the offence was to lay anything on the road which was of such a nature or so placed as to obstruct it, and that in the absence of any proof of the possibility of such obstruction the conviction was bad.

Question, whether the complaint was relevant unless it set forth that the thing laid on the road was of such a nature or so placed as to cause obstruction.

Opinion *per* Lord Young that it was not; *contra per* Lord Craighill.

1884.

No. 67.  
Leisk and  
Sandison  
v.  
Galloway.

High Court,  
Nov. 12.

Appeal.

THIS was an Appeal at the instance of JOHN LEISK and ALEXANDER SANDISON, residing in Lerwick, the individual partners of the firm of Leisk & Sandison, drapers, there, against a conviction and sentence obtained before the Sheriff-substitute there (Charles Rampini, Advocate), upon a complaint under section 26 of 8 and 9 Vic., c. 41, the Statute Labour Highways Act, 1845, as incorporated in the Zetland Road Act, 1864 (27 and 28 Vic., c. cxxxix.) In so far as upon the 23d day of July then current, or about that time, they did both and each, or one or other of them, place, or cause to be placed, two boxes on the public road, opposite, or nearly opposite, to the shop in Commercial Street, Lerwick, then and now, or lately occupied and possessed by them, whereby they have both and each, or one or other of

them, rendered themselves liable in a penalty not exceeding fifty shillings.

In the Case on Appeal it was stated that—

The appellants' agent took the following preliminary objections:—

1. That this Court has no jurisdiction. 2. That the proceedings are incompetent, and the complaint irrelevant, and there is no offence at common law, or under the Statute libelled. 3. That the prosecution is *ultra vires* of the Procurator-fiscal. All of which objections I repelled. The appellants pleaded not guilty.

It was proved that the *locus* of the complaint was Commercial Street, Lerwick, which is a portion of one of the county roads under the Zetland Roads Act, 1864 (27 and 28 Vic., c. cxxxix.); that two large boxes or packing-cases were placed as libelled, in the morning of the day in question, by persons in the appellants' employ, and for whom they were responsible, and were removed by twelve o'clock of the same day; and that the position and dimensions of the boxes were as shown on the plan produced. No obstruction to the traffic was proved, and I held that it was unnecessary to prove any such obstruction to warrant a conviction under the Statute 8 and 9 Vic., c. 41, sec. 26—the offence consisting in the laying down of any matter or thing whatsoever upon a road within the jurisdiction of the Zetland Road Trustees. The minutes of meetings of the County of Zetland Road Trustees of 17th June and 15th July 1884, and excerpt minutes of meeting of the Town Council and Commissioners of Police of the burgh of Lerwick, of date 25th July 1884, were, along with the correspondence therein referred to, produced and proved.

In the course of the evidence given by Peter Urquhart, the officer who reported the case to the respondent, he was asked, 'Did you report the case to the Procurator-fiscal of your own accord, or were you instructed to do so?' The question was objected to, and I sustained the objection.

The following objections on the merits were taken by the appellants' agent in the course of the hearing, and repelled by me:—

That the prosecution is not for the public interest; that the Procurator-fiscal has no interest to prosecute; and that the prosecution is malicious and oppressive.

The grounds of the appellants' appeal are contained in the preliminary objections and objections on the merits above stated: and, in addition, the appellants contended that the complaint refers to a matter of police regulation, which should be dealt with by the Commissioners of Police, who act under the General Police and Improvement (Scotland) Act, 1862.

I held the complaint proved, and that in law the appellants

1884.

No. 67.  
Leisk and  
Sandisonv.  
Galloway.High Court,  
Nov. 12

Appeal.

1884.

No. 67.  
Leisk and  
Sandison  
v.  
Galloway.

High Court,  
Nov. 12.

Appeal.

were responsible for the offence libelled. I accordingly convicted the appellants, and adjudged each of them to pay the sum of two shillings and sixpence sterling of modified penalty, and failing immediate payment, granted warrant for recovery thereof by poinding their goods and effects, and summary sale thereof on the expiration of forty-eight hours after such poinding, and appointed a return of poinding and sale to be made within eight days, under certification of imprisonment for two days each failing payment or recovery of said sums before the time allowed for report.

The questions of law for the opinion of Court were :—

Had the Sheriff Court jurisdiction in the circumstances? Is the complaint relevant, and was the respondent entitled to prosecute? Is the conviction good?

MACKINTOSH and H. JOHNSTON for the appellant.—  
This case is brought to test the question of jurisdiction under the Zetland Roads Act 1864, and the Lindsay Act (25 and 26 Vict., c. 101. The General Police and Improvement (Scotland) Act, 1862), in regard to offence committed on roads which are within the burgh. Section 26 and 38 of the Highway and Statute Labour Road Act of 1845 (8 and 9 Vict., c. 41) are embodied in the Zetland Roads Act (27 and 28 Vict., c. cxxxix.),<sup>1</sup> and in the latter of these sections the Procurator-fiscal and the Road Trustees, and any one authorised by the Trustees, are authorised to prosecute for offences against the Road Acts, including of course the offence in section 26 of the Act 1845. But the burgh of Lerwick has adopted the Lindsay Act, and the magistrates, as Police Commis-

<sup>1</sup> Statute 27 and 28 Vict., c. cxxxix. (The Zetland Roads Act, 1864).

This Act incorporates the Highways Act of 1845 (8 and 9 Vict., c. 41), and that Act by its 26th section imposes a penalty upon any person who 'shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon' a turnpike road, 'or on the side or sides thereof, or the footpaths or causeways adjoining.' This provision is identical with that of the 96th section of the General Turnpike Act, 1831 (1 and 2 Will. IV., c. 43).



sioners, have thereby conferred on them power to prosecute for offences, in terms of that act, committed upon the streets of the burgh. Consequently over those roads or streets, like the one in question, which are both streets in terms of the Lindsay Act, and roads in terms of the Road Acts, there is a conflict of jurisdiction. In June last it was resolved by the Road Trustees to leave infringements of the Road Act, committed within the burgh, to be dealt with by the Commissioners of Police, and in regard to offences committed within the landward part of the county, the Fiscal was desired to consult the chairman of the Road Trustees before taking proceedings. Nevertheless, upon the Magistrates declining to take proceedings against the appellants for an alleged obstruction, the Procurator-fiscal in July last brought a complaint before the Sheriff-substitute (C. Rampini, advocate) under the Road Acts, charging a contravention of section 26 of the Act of 1845, upon which objections were taken to the jurisdiction of the Sheriff and of the Procurator-fiscal to interfere, which were repelled; and the appellants, on being convicted in the circumstances stated in the Case, have taken this appeal. The question is, whether the town of Lerwick, being under the Lindsay Act, the complaint should have been tried before the Police Magistrates or before the Sheriff—whether the Procurator-fiscal had such a title to insist as warranted his interference so as to compel the Police Magistrates to do what was in his, the Procurator-fiscal's, opinion, and in the opinion of the Sheriff-substitute, the duty of the Police Magistrates. We contend that it is not for the interest of the public that the Procurator-fiscal should interfere to prosecute for offences committed within burgh, and which are included within the Lindsay Act. That Act contains a code of regulations regarding obstruction specially applicable to streets, and of more recent date than those in the Road Acts under which the proceedings were brought, which are in addition to, and although not in derogation of, the enactments in

1884.

No. 67.  
Leisk and  
Sandisonv.  
Galloway.High Court,  
Nov. 12.

Appeal



1884. Road Acts (see section 408 of the Lindsay Act), they have superseded the former provisions within the burgh. If it be not so held, the administration within the burgh will be interfered with and rendered most difficult. But further, the complaint is, we contend, irrelevant. There must be genuine obstruction libelled and proved in order to constitute the offence in section 26 of the Act of 1845 ; and the Sheriff in his statement in the Case has negatived this, and stated that no obstruction to the traffic was proved. The question therefore is, whether a person who places a box on the street at his door without obstructing any one is guilty of obstruction in the sense of section 26 of the Act of 1845. We contend that although it is not expressly set forth in the section that the article laid upon the road must be to the obstruction, annoyance, or danger of the passengers, that that is implied in the enactment, and must be either expressly libelled and proved, or the article libelled must in itself be of such a character as would necessarily cause obstruction, annoyance, or danger. *M'Donald v. White*, High Court, 9th June, 1882, Couper, vol. v., p. 19. We do not contend that it is necessary to prove that there were passengers on the road who were obstructed, but it is necessary, we contend, to libel and prove that the thing done was in its own nature obstructive, annoying, or dangerous : and as that has not been done in the present instance, as the Sheriff's statement in the Case shows, the complaint is irrelevant, and the conviction bad.

J. COMRIE THOMSON and A. GRAHAM MURRAY for the respondent.—The question is whether the county authorities are here entitled to interfere in the interests of the general public where the local authorities abstain from taking action. Although it may be of the essence of a charge under section 251 of the Lindsay Act to libel or prove that the thing done was to the obstruction, annoyance, or danger of the lieges, that is unnecessary under section 26 of the Highways Act of 1845 ; and it is not, we contend, implied. And although it may be that there

No. 67.  
Leisk and  
Sandison  
v.  
Galloway.  
High Court,  
Nov. 12.  
Appeal.

is here a concurrent jurisdiction, the Road Trustees have at all events power to prosecute. This portion of road in question is included under the Highways Act of 1845, and as such is maintained by the respondents along with the other roads in the county, and there is no repeal in the Lindsay Act of the Road Acts under which the proceedings are brought. The Trustees have therefore the same jurisdiction over the road or street in question that they have over the other roads in the county: and if the burgh takes advantage of the maintenance of this road, there is no hardship in their submitting to the regulations of the Road Acts. It may be that there was no serious obstruction in the present instance, but the object of the prosecution was to check a practice which, if persisted in, might interfere with the use of the road either as a street or a highway, and become highly inconvenient.

THE LORD JUSTICE-CLERK.—The first question here is whether the Road Trustees had jurisdiction at the place in question. I am of opinion that they had. The part of the road in question is within the limits of the trust, but it is a road or street of the burgh, and being to a certain extent a road within burgh it must be subject to the burgh authorities; otherwise the burgh administration could not go on. The result of that is that there is a concurrent jurisdiction, and therefore the objection taken to the jurisdiction of the Road Trustees to prosecute for offences in regard to the roads they maintain cannot be sustained. I am of opinion that the Road Trustees had a good title to try the question if there was a question to try.

The second objection is that there was no offence committed under the very terms of the conviction itself. The Sheriff states his own opinion in these words—‘No obstruction to the traffic was proved, and I held that it was unnecessary to prove any such obstruction to warrant a conviction under the statute.’ And I think it is clear enough that no obstruction in point of fact

1884.

No. 67.  
Leisk and  
Sandisonv.  
Galloway.High Court,  
Nov. 12.

Appeal.

84.

p. 67.

isk and  
andisonv.  
alloway.High Court,  
Nov. 12

Appeal.

existed—that these packages or packing-boxes did not obstruct the thoroughfare, and were productive of no inconvenience or injury of any kind or description. That raises a question which is a material one here, Whether the Sheriff was right or has gone wrong when he holds that obstruction is not of the essence of the offence for which the prosecution was raised? I am very clearly of opinion that obstruction is of the essence of the charge under both statutes. Although in some of the provisions of the Acts of Parliament the word ‘obstruction’ may not be used, yet the reason and sense of all these provisions is that there must be an obstruction by articles, of whatsoever kind they may be, sufficient to produce annoyance and inconvenience to passengers. I am not prepared to say that the mere laying down of an article on the road is an offence, if it is quite clear that as matter of fact no obstruction was caused, and if that has been proved to the satisfaction of the judge himself. I am therefore prepared to sustain the appeal, and recall the judgment on that ground, while I hold that there was sufficient jurisdiction to prosecute.

LORD YOUNG.—I am of the same opinion. I agree with your Lordship that this road was within the jurisdiction of the Road Trustees, and that there was concurrent jurisdiction here. I also think that the prosecutor had good title, although, for a reason which I shall state immediately, I think that he would have acted on the whole with more discretion if he had abstained from using his title upon this occasion, and that he will only act properly if he abstains from using it in similar circumstances in the future. I am also of opinion that your Lordship, that in the exercise of his jurisdiction the Sheriff has fallen into an error in law. I more doubt the relevancy of the complaint, and if it is necessary to the judgment to decide that matter, I be prepared to decide now that the complaint is relevant. I have it before me now, and the case to this effect, that the parties complained of, on

day, placed two boxes on the public road opposite or nearly opposite to a certain shop. Now, I do not think that is necessarily an offence under the statutes. I think it altogether omits what was conceded and what must be conceded, when one comes to consider the matter intelligently, is the very gist of the offence, namely, that the things, whatever they were, were such and so placed as to cause an obstruction,—not that it is essential to the offence that there should have been passengers or traffic passing to whom they were an obstruction: there might be none; and therefore it might happen that a dangerous thing had not been productive of danger, or an obstructive thing—obstructive in its own nature—had not been productive of any obstruction: but the gist of the offence is obstruction, and I think in any relevant complaint for that offence that obstruction must be charged. I do not say in what words it must be charged, or indeed that any particular words are necessary, but I think it is not enough just to say that on a certain day something was placed on the road,—a stick for example set up against a wall, or a box, or two boxes,—I do not think relevancy is achieved by the fact that the clause of the statute does not contain the words ‘to the obstruction of the lieges’ or similar words. It is a very long and far from being a clear clause: but in so far as it specifies an offence, it implies that which in a charge under the statute ought to be expressed although the statute may not express it.

But I think the Sheriff in deciding upon the question of relevancy appears to have mistaken the law by holding, as he manifestly did, that no obstruction was necessary to warrant a conviction—I mean that the thing was not in its own nature and character calculated to produce a disadvantage of the nature of an obstruction, as Mr Thomson expressed it, or an obstruction as I call it more briefly. I say that that is an error in law. On that ground therefore, although there was jurisdiction and although the prosecutor had a good title, I think this

1884.

No. 67.  
Leisk and  
Sandisonv.  
Galloway.High Court,  
Nov. 12.

Appeal.

1884.

No. 67.

Leisk and  
Sandison

v.

Galloway.

High Court,  
Nov. 12.

Appeal.

conviction must be set aside. Even if there was a relevant complaint, which I think there was not, it appears on the case to my satisfaction that the Sheriff was under an erroneous impression as to the law. But I have said that I think the prosecutor would have done well to have abstained from exercising his right to prosecute here. It seems that there was a somewhat unpleasant controversy as to whether he should at his own hand prosecute such cases before the Sheriff without the instructions of the Road Trustees under whose charge the road is, or leave it to the local authorities to take action: he seems to have broken somewhat with the Road Trustees. They had appointed him their prosecutor, and they had instructed him not to meddle with matters within burgh, but to leave these to the burgh authorities, and he rebelled against their instructions. He said he would not stand that, and would throw up his appointment. Therefore, against the wishes of the Road Trustees, and in the exercise of his own authority as the Fiscal, he institutes this prosecution before the Sheriff Court. Now I think the Sheriff might consider whether he might not with advantage instruct the Fiscal that he is not to institute such prosecutions without the instructions of the Road Trustees, under whose charge the road is, and against the wish of the burgh authorities. I think if they instructed him to institute a prosecution it would wear a different complexion, but if they tell him no, and say that it is more convenient to leave the management of streets within burgh, although they are of the character of roads, to the jurisdiction of the local authorities, he had better follow that advice; at all events he should be encouraged to follow that course rather than the course he has adopted. That is all I meant by saying that I thought he would have acted with more discretion on the whole, if he had abstained from exercising his title on the occasion in question, and that he will so act more prudently if he abstains from exercising that title on a similar occasion.

LORD CRAIGHILL.—I also think that the Procurator-fiscal of the county had a good title to prosecute, there being a concurrent jurisdiction in the Road Trustees and in the Magistrates of the burgh. Originally the Road Trustees were the only parties who had a title to complain, because there were no other parties but the Road Trustees to exercise the jurisdiction over the parties. There were no Magistrates in the burgh. The Magistrates were called into existence by the adoption of the General Police Act ; but there is nothing in the provisions of that Act which deprives the Road Trustees of any power or authority which they previously possessed in the management of the roads. The Act gave the Commissioners certain powers to be exercised in a certain way, and, amongst others, power to prosecute in the event of a contravention of the Police Act, and they were entitled to exercise that power ; but that did not deprive those who had, before this time, had certain powers. I therefore agree in thinking there was clear concurrent jurisdiction, and in repelling the objection to jurisdiction. On the matter of relevancy little was said at the bar, and I am not now of opinion that if the objection had been taken I could have sustained it. The words of the Act of Parliament have been employed, and that certain words have been used in the Act of Parliament supplies to my mind a good reason for holding that a complaint which sets forth the offence in these same words is a sufficient compliance with the Act so far as relevancy is concerned. If articles are alleged to be laid down, there is good reason for contending that the person by whom these things are laid down, when brought before the Court, is the person who must show that there is only a nominal and not a real contravention—that what has been laid down does not interfere with any right which any one can exercise, viz., in other words, show that there is no obstruction to the traffic. I have a good recollection of what was decided in the Portobello case, where it was determined that it was not necessary to in-

1884.

No. 67.  
Leisk and  
Sandison  
v.  
Galloway.

High Court,  
Nov. 12.

Appeal.

1884. introduce into the complaint an averment that the matter  
laid down was an obstruction to the traffic. The Court  
No. 67. determined that where things were of their own nature  
Leisk and sufficient to cause obstruction, it was unnecessary that  
Sandison it should be stated in the complaint that it was to the  
v. obstruction of the traffic or the passengers. But while  
Galloway. that is so, I agree with your Lordships that the appeal  
ought to be sustained, because while the Sheriff has  
found that these packages were put upon the street, and  
allowed to remain there, he has also found that in truth  
there was no obstruction—and indeed it is conceded  
that really there was no ground of complaint in so far  
as the convenience of the public was concerned—and he  
has proceeded to judgment on the footing that he was  
bound to convict under the terms of the Act of Parlia-  
ment although no obstruction existed. On that ground  
alone I am of opinion that the Appeal ought to be sus-  
tained.

The following was the Interlocutor :—

‘*Edinburgh, 12th November 1884.*—Having con-  
sidered this Case and heard counsel for the parties, Sus-  
tain the appeal, reverse the determination of the inferior  
judge, and decern: Find the appellants entitled to  
expenses, which modify to five guineas; for which, and  
one guinea as the dues of extract, decern against the  
respondent.’

Agents for the Appellants—Messrs MACKENZIE & KERMACK, W.S.

Agent for the Respondent—THOMAS CARMICHAEL, S.S.C.

---



Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

MALCOLM MACNAUGHTON, Appellant—*Lang.*

AGAINST

W. C. W. MADDEVER, Respondent—*Rhind.*

**NUISANCE FROM SMOKE—SUSPENSION—REVIEW—COMPETENCY—**  
**STATUTE 20 AND 21 VIC., c. 73, SECS. 1, 2, 6, 7, AND 9** (An Act  
 for the Abatement of Nuisance arising from the Smoke of Furnaces  
 in Scotland)—**ALTERNATIVE CHARGE—PENALTY, MINIMUM.—**  
 The master of a steam vessel charged before the Magistrates of a  
 Burgh with an offence under sections 1 and 2 of the Smoke  
 Nuisance Abatement Act (20 and 21 Vic., c. 73) upon a com-  
 plaint under the Summary Jurisdiction (Scotland) Acts, 1864,  
 and 1881, on being convicted of 'the offence charged,' brought a  
 Bill of Suspension in the High Court, and pleaded *inter alia* that  
 the charge being alternative the conviction was void : and, further,  
 that the complaint must be held not to have been brought, nor the  
 conviction to have been obtained under, or by virtue of the Smoke  
 Nuisance Act libelled, and that the limitations of review therein  
 did not therefore apply, and the Bill was competent.

Held that the complaint did not contain an alternative charge,  
 and that in terms of sections 6, 7, and 9 of the statute libelled,  
 the Bill was incompetent.

THIS was a Suspension of a conviction and sentence  
 by two of the Magistrates of the burgh of Rothesay,  
 obtained at the instance of the Burgh Fiscal, WILLIAM  
 COOMBE WALLACE MADDEVER, upon a complaint under  
 the Summary Jurisdiction (Scotland) Acts, 1864 and  
 1881, the Acts 20 and 21 Vic., c. 73 ; 24 Vic., c. 17 ;  
 and the Act 28 and 29 Vic., c. 102.

1884.  
 —  
 No. 68.  
 Macnaugh-  
 ton  
 v.  
 Maddever.  
 —  
 High Court,  
 Nov. 12.  
 —  
 Suspension.

The complaint set forth :—

That Malcolm Macnaughton, now or lately master of the steam  
 vessel *Launcelot*, of Glasgow, has been guilty of an offence within  
 the meaning of the Act 20 and 21 Vic., c. 73, entitled 'An Act  
 for the Abatement of the Nuisance arising from the Smoke of  
 Furnaces in Scotland,' sections 1 and 2 thereof, actor or art and  
 part : In so far as on the 31st day of July 1884, or about that

1884.  
 No. 68.  
 Macnaughton  
 v.  
 Maddever.  
 High Court,  
 Nov. 12.  
 Suspension.

time, the said Malcolm Macnaughton, being the master of the said steam vessel, there was or were one or more furnace or furnaces employed in said steam vessel in the working of the engines by steam, not so constructed or altered so as to consume or burn the smoke arising therefrom, and the said Malcolm Macnaughton, between the hours of four and five o'clock in the afternoon of said day (31st July 1884), while said steam vessel was at the pier of Rothesay, in the burgh of Rothesay, so negligently used said furnace or furnaces as that the smoke arising therefrom was not effectually consumed or burnt, whereby the said Malcolm Macnaughton, being the master of the said steam vessel, shall forfeit a sum not more than £5, nor less than 40s., and such offence is a first offence.

The conviction bore that 'the Magistrates, in respect of the evidence adduced, convicted the said Malcolm Macnaughton of the offence charged.'

In the Bill it was pleaded that the complainer is entitled to suspension in respect—

The complaint charges the complainer with two offences, and the conviction does not specify which offence he was found guilty of. It was incompetent to find the complainer guilty of the first offence set forth in the complaint, as no evidence was adduced in support thereof. It was incompetent to find the complainer guilty of the offences charged, as evidence was only adduced in support of one of them. The penalty of £2 was inflicted by the magistrates under essential error as to their powers.

RHIND, for the respondent, objected to the competency.—Sections 6 and 7 of the statute libelled (20 and 21 Vic., cap. 73), provide for an appeal to the Sheriff, and to the Lord Ordinary on the Bills in certain cases only, and upon a certification made by the Sheriff as therein provided,<sup>1</sup> which judgment

---

<sup>1</sup> Statute 20 and 21 Vic., cap. 73 (An Act for the Abatement of the Nuisance Arising from the Smoke of Furnaces in Scotland).

Section 1.—'From and after the 1st day of August 1858 every furnace employed or to be employed in the working of engines by steam, whether locomotive or otherwise, in any place to which this Act shall apply, or on board of any steam vessel stopping at

the latter section declares 'shall be final, and in no case subject to review.' And section 9 declares 'that no appeal from nor suspension of any decree or sentence under this Act shall be competent, nor shall any decree or sentence be subject to any review whatever, save in cases certified as aforesaid.' This is not one of the cases

1884.

No. 68.  
Macnaughtonv.  
Maddever.High Court,  
Nov. 12.

Suspension.

or in any such place, or in or at any port, pier, landing place, or harbour within the same, or when plying on any part of a river which at such part shall not exceed a quarter of a mile in breadth,' . . . . 'shall in all cases be constructed or altered so as to consume or burn the smoke arising from such furnace; and if any person or company shall, after the 1st day of August 1858, use in any such place, or on board of any such steam vessel, any such furnace which shall not be constructed so as to consume or burn its own smoke, or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed or burnt, every person or company so offending, being the owner or occupier of the premises or the owner of the locomotive engine in which any such furnace shall be, or being a foreman or other person employed by such owner or occupier in connection with such furnace, or being the owner and master or other person in charge for the time being of any such steam vessel, shall, upon a summary conviction for such offence before the Sheriff or Sheriff-substitute of the county, or any two justices having jurisdiction within the place within which, or adjacent to the port, pier, landing place, river, or harbour in which the offence against this Act is alleged to have been committed, where such place is not a burgh, and where such place is a burgh, then before the Sheriff or Sheriff-substitute of the county within which or within any part of which the same shall be situate, or before the magistrate of such burgh, forfeit and pay a sum not more than five pounds, nor less than forty shillings.'

Section 2.—'Provided always that the words consume or burn the smoke shall not be held in all cases to mean consume or burn all the smoke,' &c.

Section 6 provides that magistrates or justices are not to act where the expense of altering or amending the furnace will exceed £25, but to certify to that effect on the petition, and that thereupon it shall be incompetent to proceed further before them.

Section 7 provides that in that case also the Sheriff shall likewise certify to the same effect in his decree, and that the parties shall thereupon be entitled to appeal to the Sheriff from whose judgment an appeal to the Lord Ordinary on the Bills is provided, 'which judgment shall be final, and in no case subject to review.'

1884.  
 No. 68.  
 Macnaughton  
 v.  
 Maddever.  
 High Court,  
 Nov. 12.  
 Suspension.

provided for in those sections, and it has not been certified as such ; and in any view review by Suspension in this Court is incompetent.

LANG for the respondent.—This complaint is brought under the ‘Summary Jurisdiction (Scotland) Acts 1864 and 1881,’ and we object, first, that it charges two offences and is in reality alternative, although not professedly so, while the conviction, which is general, does not specify which offence the suspender is found guilty of. The first offence is that of there being on board of said steam vessel, a furnace not so constructed or altered as to consume or burn the smoke arising therefrom, and the other offence is the so negligently using the said furnace as that the smoke arising therefrom is not effectually consumed or burnt. But the conviction is simply ‘of the offence charged.’

THE LORD JUSTICE-CLERK.—The offence in the statute is the emission of unconsumed smoke, and whether that arises from the malformation of the furnace or the misuse of it does not signify. If the furnace emits smoke so as not to be able to be prevented, or if, while it is capable of being prevented, the emission of smoke is not prevented, the offence is committed. Although these are two causes which may give rise to the offence of emitting unconsumed smoke, they do not constitute two offences.

LANG for the suspender.—The complaint uses the copulative ‘and’ in libelling the charge, and our contention is that it sets forth an alternative in the *modus*, and that that makes it an alternative charge. The statute contemplates that there may be a properly constructed furnace which is misused, with the result that unconsumed smoke is emitted, and that is one offence ; or that there is an improperly constructed furnace leading to the same result, and that is the other offence. Secondly, the Magistrates inflicted a penalty of £2 in the belief that that was the smallest penalty which it was within their power to inflict. The prayer concludes that

the suspender shall forfeit a sum of not more than five pounds nor less than forty shillings, and that is taken from the first section of the Act 20 and 21 Vic., c. 73, the statute libelled. The complaint ought not to have stated a minimum sum. By the sixth section of the Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vic., c. 33), it is *inter alia* enacted that 'in all proceedings under the Summary Jurisdiction Acts, when the punishment of a fine or penalty is imposed, the Court may reduce the amount of such fine;' and no reference was made to this enactment either in the complaint or at the hearing of the case. The Court accordingly, while inflicting, as the Magistrates said at the time, 'the lowest penalty,' had not before them all the alternatives open to them in sentencing. *Thomson v. Wardlaw*, High Court, Jan. 23, 1865, Irv., vol. v., p. 45. The complaint was therefore defective, and the sentence was pronounced under essential error. Lastly, with reference to the objection raised to the competency, there is here no room for such an objection. The objections raised in the Bill are to the essence of the charge. The charge was not brought in terms of the statute libelled. The limitations of review therefore contained in the statute did not apply.

THE LORD JUSTICE-CLERK.—Upon the last objection taken for the suspender, viz., regarding the conclusion in the complaint for a *minimum* penalty, it is unnecessary to pronounce judgment. It might have had some importance if we had not come to be of opinion on the merits that this is not an alternative complaint. The nuisance complained of and the evil which it was sought to prevent was the emission of unconsumed smoke, and that might, in terms of the statute, arise from two causes only—the one being defective machinery, and the other careless use of good and effectual machinery. The Act libelled truly means that the thing to be guarded against and to be punished is the emission of smoke, and it is immaterial whether that has arisen from the one

1884.  
No. 68.  
Macnaughton  
v.  
Maddever.  
High Court,  
Nov. 12.  
Suspension.

1884. cause or the other. I am therefore for refusing to sustain  
 No. 68. the Bill upon the merits.  
 Macnaughton But upon the point of competency raised I think that  
 v. the objection should prevail, and that the Bill should  
 Maddever. be found to be incompetent.  
 High Court, Nov. 12. LORD YOUNG.—I concur. I think that the Bill is  
 Suspension. incompetent, and that there are no merits.

LORD CRAIGHILL.—That is also my opinion.

The following was the Interlocutor pronounced :—

‘*Edinburgh, 12th November 1884.*—Having considered this Bill and heard counsel for the parties, Refuse the Bill, and decern : Find the respondent entitled to expenses, which modify to five guineas ; for which, and one guinea as the ducs of extract, decern against the complainer.’

Agents for the Suspenders—Messrs J. & A. PEDDIE & IVORY, W.S.  
 Agents for the Respondent—

---

Present.

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THOMAS NELSON, Appellant—*J. Comrie Thomson.*

AGAINST

JAMES CROCKATT, Respondent.—*The Hon. H. J. Moncrieff.*

APPEAL, CASE ON—PROCEDURE—STATUTE 38 AND 39 VIC., c. 62, SEC. 3, SUBSEC. 9 (Summary Prosecutions Appeals Act, 1875)—AMENDMENT OF CASE—REMIT TO TAKE ADDITIONAL EVIDENCE.—Circumstances in which the High Court remitted to the Inferior Court a Case stated on Appeal under the Summary Prosecutions Appeals Act, 1875, for the purpose of receiving additional evidence, and of amending the Case.

No. 69. ON 1st December 1883, THOMAS NELSON, Cattle Sales-  
 Nelson man, Glasgow, was charged in the Justice of Peace Court  
 v. of Kincardineshire at Stonehaven, at the instance of JAMES  
 Crockatt. CROCKATT, Procurator-fiscal, with an offence against the  
 High Court, Nov. 13. Contagious Diseases (Animals) Act, 1878. In so far as  
 Appeal. on or about 12th or 13th October 1883, in contravention  
 of the then existing regulations of the Local Authority

f Kincardineshire, made under the powers conferred by the said Act and the relative Order in Council, and, *inter alia*, providing that animals might be moved into the district of the Local Authority of the county of Kincardine from the district of any other Local Authority in Scotland, upon a declaration and an undertaking, signed and delivered up to the nearest constable within twenty-four hours, specifying certain particulars with respect to the sanitary condition and disposal of the animals, he had moved forty bullocks from Perth, or other Local Authority district in Scotland, to the farm of Spurry-hillock, in the parish of Laurencekirk, without a declaration and undertaking, signed and delivered, in terms of the said regulations.

Nelson pleaded not guilty, and on being convicted and fined, obtained a Case stated under the Summary Prosecutions Appeals Act, 1875, from which the following facts appeared :—

Nelson forwarded by rail from Perth to Laurencekirk station forty bullocks. They arrived late on the evening of Friday, 12th October, and were, early on Saturday the 13th, removed from the railway-station to Spurry-hillock, where they were kept till the morning of Monday the 15th, as had been done in previous cases. They were then taken to Laurencekirk market, and exposed for sale. It was not shown how they were afterwards disposed of, but it was proved that there was no declaration and undertaking signed and delivered. The appellant contended that the case did not fall within the regulation founded on, maintaining that the bullocks had been moved into the Kincardineshire district for exposure at a market, in which event, under another article of the regulations, the declaration and undertaking were not required, but (as the Case bore) ‘no evidence was led by the appellant, and there was no other proof than that of the facts above stated, to show that the animals were moved into the district of the Local Authority of the county of Kincardine for exposure

1884.

No. 69.

Nelson

v.

Crockatt.

High Court,  
Nov. 13.

Appeal.



1884. at a market, and the Justices held that the bullocks  
 No. 69. having been taken to the farm of Spurry-hillock on their  
 Nelson being moved into the district of the Local Authority of  
 v. the county of Kincardine, and having been kept there  
 Crockatt. for two days prior to exposure at a market, a declaration  
 High Court, and undertaking in terms of the regulation first quoted  
 Nov, 13. was necessary.<sup>1</sup>  
 Appeal.

The question of law was, whether, in the circumstances, the appellant was guilty of a contravention of the regulations.

The appellant lodged a Note, in which he stated that at the trial 'it was proved by the prosecutor's own witnesses that the cattle which form the subject of the offence were brought into the county of Kincardine by the appellant on Saturday the 13th October 1883, for exposure at a public sale in Laurencekirk on Monday morning following. This was in conformity with his practice for years past, but, notwithstanding, when the case was being adjusted by the parties, both the prosecutor and the clerk of Court refused to insert those facts into the case, and insisted on a statement being inserted that the appellant had led no proof on the matter.'

The appellant therefore prayed the Court to amend the Case to the effect of stating that the cattle in question were moved into the district of the Local Authority for exposure at a market or public sale on 15th October, or to do otherwise as to the Court might seem proper.<sup>1</sup>

---

<sup>1</sup> Statute 38 and 39 Vic., cap. 62 (The Summary Prosecutions Appeals (Scotland) Act, 1875).

Section 3.—See Note, p. 275.

Subsection 9.—'The Superior Court shall have power to affirm, reverse, or amend the determination in respect of which the Case has been stated, or to remit the matter to the Inferior Judge with the opinion of the Court thereon ; or to make such other order in relation to the matter and the costs of the Appeal as they shall see fit, or to cause the Case to be sent back to the Inferior Judge to be amended in such manner as they shall direct, and thereafter, on the Case being amended and returned, to deliver judgment on the Case as amended.'

After hearing parties the Court on 23d February 1884 pronounced this interlocutor:—‘Before answer, Remit to the Justices to receive evidence as to whether the cattle in question were moved into the district of the Local Authority of the county of Kincardine for exposure at the Laurencekirk market held on Monday the 15th October last, and thereafter to amend the case accordingly.’

1884.  
No. 69.  
Nelson  
v.  
Crockatt.  
High Court,  
Nov. 13.  
Appeal.

On 15th March the Justices received the evidence of certain witnesses who were examined on behalf of the appellant, and thereafter found it now proved that the cattle in question were moved into the district of the Local Authority of the county of Kincardine for exposure at the Laurencekirk Market, held on Monday 15th October last, and to that extent amend the Case accordingly.

The High Court thereafter pronounced the following interlocutor:—

‘*Edinburgh, 15th July 1884.*—Having resumed consideration of this case as amended, and heard counsel for the parties, Sustain the appeal: Reverse the determination of the Justices: Find the appellant entitled to expenses, which modify to five guineas; for which, and one guinea as the dues of extract, decern against the respondent.’

Agents for the Appellant—Messrs GUNN & FODD, S.S.C.  
Agent for the Respondent—WILLIAM B. RAINNIE, S.S.C.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

THOMAS WILSON, Appellant—*J. Comrie Thomson*,

AGAINST

JOHN HARVEY, GEORGE RITCHIE, and GEORGE WATT TAYLOR,  
Respondents—*Orr*.

**SALMON FISHING—POSSESSION OF SALMON DURING CLOSE TIME—  
POACHING—STATUTE 31 AND 32, VICT. C. 123, SEC. 21 (Salmon  
Fisheries (Scotland) Act, 1868)—FISHING WITH NET—FISHING  
WITH ROD.**—The 21st section of the Salmon Fisheries (Scotland)  
Act, 1868, which prohibits the having salmon in possession  
between the commencement of the latest and the termination of  
earliest annual close time which is in force *for any district*, applies  
to that period during which all the rivers within the limits of the  
Act are closed, and no conviction therefore can be obtained under  
it so long as any of these rivers are open.

Question whether it applies to the period during which net fishing  
is illegal, but rod fishing is allowed.

1884.

No. 70.  
Wilson  
v.

Harvey and  
Others.

High Court,  
Nov. 13.

Appeal.

THIS was an Appeal at the instance of THOMAS WILSON, Clerk to the District Board of the District of the river Dee, against a judgment of acquittal pronounced by one of the Sheriff-substitutes for Aberdeen (J. Dove Wilson, Advocate), upon a complaint which set forth that JOHN HARVEY, GEORGE RITCHIE, and GEORGE WATT TAYLOR, labourers in Aberdeen, 'have all and each of them been guilty actors or act and part of an offence within the meaning of The Salmon Fisheries (Scotland) Act, 1868, and in particular of the 21st section of the said last-mentioned Act.'<sup>1</sup>

IN SO FAR AS during part of the time between the hours of six o'clock and eight o'clock of the morning of *Tuesday the 9th day of September 1884*, in or near Langstane Place, in Aberdeen, &c., the said John Harvey, George Ritchie, and George Watt Taylor, all and each of them, or one or more of them, had in their possession, or in the possession of one or more of them, eighty-five salmon, sea trout, or other fish of the salmon kind, taken within the limits of

<sup>1</sup> See foot-note, p. 520.

the said last-mentioned Act, between the commencement of the latest and the termination of the earliest annual close time *in force at the time for the said district of the river Dee*, whereby the said John Harvey, George Ritchie, and George Watt Taylor, all and each of them, or one or more of them, are or is liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon, sea trout, or other fish of the salmon kind in their possession, or in the possession of one or more of them, as afore-said, and to forfeiture of said salmon, sea trout, or other fish of the salmon kind, and of a net found in their possession, or in the possession of one or more of them, at the time libelled: [There was then libelled one previous conviction under the Act 9 George IV., c. 39, against John Harvey, and three previous convictions under the Salmon Fisheries (Scotland) Act, 1868, against George Watt Taylor, and the complaint further set forth] and that by the 33d section of the said last-mentioned Act he the said George Watt Taylor is, subject to your Lordship's discretion, liable on conviction for a third or subsequent offence, under the Salmon Fisheries (Scotland) Acts, in the greatest amount of penalty that can be imposed by said Acts, and to forfeiture of any net found in his possession; as also the said John Harvey, George Ritchie, and George Watt Taylor, all and each of them, or one or more of them, are or is liable in terms of the 38th section of the said Salmon Fisheries (Scotland) Act, 1868, in the expenses of this complaint and procedure to follow hereon.

1884.

No. 70.

Wilson

v.

Harvey and  
Others.High Court,  
Nov. 13.

Appeal.

In the Case on Appeal, after narrating the complaint, it was stated that—

‘The respondent, George Watt Taylor, failed to appear, and on the complainer's motion the case, as against him, was adjourned to 24th October 1884, and that’

the question of law submitted for the opinion of the High Court was, Whether the respondents, from the facts set forth and proved, can be convicted of the offence libelled.

It was further stated in the Case by the Sheriff—

The respondents John Harvey and George Ritchie appeared and pled not guilty. I found it proved as matter of fact, by the evidence of two witnesses, that on the 9th day of September 1884, the occasion libelled, the three respondents were in, or seen in, Langstane Place, in the city of Aberdeen, together. That on their observing one of the witnesses, an inspector of fishings, the respondent George Watt Taylor left the two other respondents, and ran up another street. That he was pursued, and dropped a bag, which was taken

1884. possession of by the witnesses, and found to contain eighty-five sea  
 No. 70. trout. That in the possession of the other respondents a net of an  
 Wilkie illegal mesh was found, with which I entertained no doubt that the  
 r. fish had been caught.  
 Harvey and Others.

The circumstances shewed that the three accused were acting in  
 High Court, common, and that the fish and net were in the joint possession of  
 Nov. 12. all of them.

Appeal

The previous conviction of a breach of the Salmon Fisheries Act, 9 Geo. IV., c. 39, as libelled against the respondent John Harvey, was proved.

It was clear that the fish had been caught within the limits of the Act libelled, but not proved by the complainer when or in what district the fish had been taken.

On the other hand, no proof was adduced by the respondents to shew that the fish had been caught by rod and line, or in any legal manner.

I found, from the Salmon Fisheries (Scotland) Act, 1868, Schedule C., that the annual close time for the district of the river Dee commences on the 27th day of August in each year, and terminates on the 10th day of February following, and that subsequent to the commencement and prior to the termination of the annual close time, viz., from the 27th day of August to the 31st day of October, both days inclusive, in each year, it is lawful to fish for and take salmon with rod and line, in terms of the Salmon Fisheries (Scotland) Act, 1862, sections 6 and 8.

On these facts, and on the provisions of the Acts of Parliament, I, on the 10th day of October 1884, found the respondents John Harvey and George Ritchie not guilty of the offence libelled, therefore assoilzied them from the complaint, found them entitled to 12s. 6d. of expenses, for which sum decerned against the complainer.<sup>1</sup>

---

<sup>1</sup> Statute 31 and 32 Vic., c. 123 (The Salmon Fisheries (Scotland) Act, 1868).

Sect. 21.—‘Any person who shall buy, sell, or expose for sale, or have in his possession any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, shall be liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon so bought, sold, or exposed for sale or in his possession, and any salmon so bought, sold, or exposed for sale or in his possession shall be forfeited; and the burden of proving that any such salmon was caught beyond the limits of this Act shall lie on the person selling or exposing the same for sale, or having the same in his possession.’

J. COMRIE THOMSON for the appellant.—We contend that there ought to have been a conviction in this case. The Sheriff has decided it upon the case of *Blair v. Shepherd*, Perth, April 12, 1871, Couper, vol. ii., p. 28. But here the respondents were acting in common, and had in their possession an illegal net with which there was no doubt the fish had been taken within the annual close time for fishing with net and coble, but during the extended time within which it is legal to fish with rod and line within the district of the river Dee, viz., between the 27th of August and the 31st of October.

LORD YOUNG.—And the question is, whether that period is, or is not annual close time within the meaning of this penal section, section 21.

J. COMRIE THOMSON for the appellant.—And where also the Sheriff has found it proved that the fish were caught with a net of an illegal mesh. We contend that there is only one close time fixed by the statute, viz., the close time for net fishing between 27th August and 10th February. The expression, ‘annual close time’ in the statute is used only with reference to net fishing. And the extended period within which rod fishing is allowed, is referred to in the statute as a privilege and is treated as an extension of time, and an exception to the enactments regarding close time. The idea in the statute is, that as matter of gain there shall be an annual close time of a fixed duration, and that as a matter of recreation there shall be a period within that close time which shall form an exception to it; and this view is favoured by the enactment in section 7 of the Salmon Fisheries (Scotland) Act, 1862, which declares that ‘the annual close time for every district shall continue for 168 days.’ If the Sheriff’s view be correct there will be two annual close times for the district of the river Dee, only one of which will continue for that period, and the annual close times within different districts will vary in extent. *Stevenson v. M’Levy*, High Court, 21st Feb. 1879, Couper, vol. iv., p. 196.

1884.

No. 70.  
Wilson v.Harvey and  
Others.High Court,  
Nov. 13.

Appeal.

1884. LORD YOUNG.—Why were the respondents not tried for poaching?

No. 70.  
Wilson  
v.  
Harvey and  
Others.

High Court,  
Nov. 13.

Appeal.

J. COMRIE THOMSON for the appellant.—Because probably there would have been some difficulty in proving where the fish were actually caught.

LORD YOUNG.—What construction do you put upon the expression in section 21 of the statute of 1868, ‘have in his possession any salmon taken *within the limits of this Act* between the commencement of the *latest* and the termination of the *earliest* annual close time which is in force at the time *for any district*.’ If you maintain that there are not two close times, one for nets and another for rod and line, to what do the words ‘*latest*’ and ‘*earliest*’ refer?

THE LORD JUSTICE-CLERK.—I rather think that these words refer to the annual close time in the different districts in Scotland, and to the fact that the close times for net and coble fishing are not the same in all the districts, some being earlier and some later.

LORD YOUNG.—Then if the view of the Lord Justice-Clerk is correct as to the proper reading of the section—and I think it is, as I see by referring to Schedule C, of the Act of 1868 that there are several of the rivers in Scotland where the net and coble close time had not commenced on 9th September, the date here libelled—then no complaint charging a contravention of section 21 on that date was possible.

J. COMRIE THOMSON for the appellant.—With that fact before me, and in respect of the indication of your Lordship’s views as to the reading of section 21, I shall not pursue my argument further, although I must point out that this was not the ground upon which the Sheriff decided the case.

ORR for the respondent was not called upon.

THE LORD JUSTICE-CLERK.—This is a question of very wide application and of very great importance, and for my part, before deciding it, I should have liked to be quite certain that we had had the advantage of



having heard all the argument that could be offered on both sides as to the construction of the 21st section of the Salmon Fisheries Act of 1868, before we decided it. My impression, however, certainly is that the section can only take effect at a time when fish could not be lawfully caught by net and coble within the limits of the Act—viz., in any of the districts of Scotland. Otherwise the clause would be unworkable; for if it was necessary to prove that the salmon was caught within a particular district, that could never be done in a satisfactory manner. I think, therefore, that it is quite clear that the words, ‘between the commencement of the latest annual close time,’ ‘in force for the time for any district,’ means the commencement of the annual close time in the latest district in the country: and that, therefore, possession ‘during close time’ means possession after close time has begun in every district in Scotland.

The question might be raised as to whether there might be legal possession of salmon between the beginning of the net close time and the end of the extended open time for rod-fishing, and upon whom rested the burden of proving the manner in which the fish was taken, but resting our judgment, as we do, on the above considerations it is unnecessary to decide these questions. I am for dismissing the appeal.

LORD YOUNG.—I am of the same opinion. Indeed, Mr Thomson, very properly acquiescing in our view of the law, leaves us no alternative than to dismiss the appeal. The case is as your Lordship has said, one of interest and importance, but I should not myself consider it attended with much doubt when it comes to be understood. These men were found in the possession of a number of salmon in Aberdeen, and a net, with which no doubt the fish had been taken in the waters of the Dee or the Don in the neighbourhood; and it is plain that they were poachers fishing successfully for salmon in the close time. It is explained that they were not

1884.  
No. 70.  
Wilson  
v.  
Harvey and  
Others.  
High Court,  
Nov. 13.  
Appeal.

1884.  
No. 70.  
Wilson  
v.  
Harvey and  
Others.  
High Court,  
Nov. 13.  
Appeal.

prosecuted for that offence, of which they were undoubtedly guilty, because possibly or probably there might have been some difficulty in ascertaining the exact place where the fish were taken. But the important observation is that they were undoubtedly guilty of the offence of fishing during the annual close time of the Aberdeen district. But, as I have said, they were not prosecuted for that offence, but under clause 21 of the Salmon Fisheries Act of 1868, which applies to the mere possession, equally by a fishmonger who has fish in his shop, or a private person having it in his house. That is a very special and severe clause, and it puts persons on their guard, not against taking fish, but against having them in their possession at a period when fresh fish of that kind cannot be lawfully in possession in Scotland. If that be so, then a person is not guilty under the statute if he has salmon in his shop or larder, as the case may be, at a period when fish of the kind may be lawfully caught in any place in Scotland. It is open time for taking them, and I am individually of opinion that this construction applies to the latest open time, or before the commencement of the latest close time, not only in any district in Scotland, but to any mode of taking the fish, the possession of which is questioned. I need not ask or prove how they were taken. I may lawfully, so far as this clause is concerned, have the fish, when they may be lawfully caught by rod. I need not enquire before buying a fish whether it was caught by rod or net, whether fish of that kind in its fresh state may be lawfully possessed. It is not for me to prove how it was caught. I think therefore that the clause applies to the latest period of close time not only with reference to space or territory in Scotland, but also the mode of taking the fish. This is, however, only my own individual opinion, and it is not necessary for the Court in this case to decide the point, though I should be prepared to decide the case conformably with the Sheriff's view on that point.

Not that I think for a moment that these men were not poachers, but the same legal construction would have applied to any gentleman in Aberdeen having salmon in his larder; and if the opposite construction was sound he would have been guilty unless he proved that the fish had been caught by rod.

1884.

No. 70.  
Wilsone  
r.Harvey and  
Others.High Court,  
Nov. 13.

Appeal.

LORD CRAIGHILL.—I am entirely of the same opinion. I think that the interpretation suggested by your Lordships of the 21st section of the Act is the true one. The appellant has, I think, no alternative but to abandon his appeal, as there is no ground for it. His case fails. Whatever may be said as to rod-fishing, there is no doubt that it was necessary that the prosecutor should set forth in his complaint and prove that on 9th September, the date libelled, there was no open time on any of the rivers within the limits of the statute. But that he could not have proved because he could not prove an impossibility.

That is, I think, enough for the dismissal of the case. I may add that I have no clear and decided opinion on the second question enlarged on by Lord Young. I am, however, inclined to think, although I should desire to hear more upon the subject from the bar if we were to decide it, that the grounds of the Sheriff-substitute's judgment are not well-founded. If the defence were set up that those fish had been taken by rod during the extension of time given for that purpose by the statute, it would, I should say, be reasonable to find that that was matter of defence. If that defence was taken and established, good and well, if it was not taken or not established, then the case of the prosecutor would be established. But that is a mere impression, for I have formed no distinct opinion on the subject.

The following was the Interlocutor :—

‘ *Edinburgh, 12th November 1884.*— Having considered this case, and heard counsel for the parties, Dismiss the appeal, and decern: Find the respondents

1884. entitled to expenses, which modify to five guineas ; for  
 No. 70. which, and one guinea as the dues of extract, decern  
 Wilsons against the appellant.'  
 v.  
 Harvey and  
 Others.  
 Agent for the Appellant—JOHN BELL, W.S.  
 High Court,  
 Nov. 13.  
 Appeal.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ROBERT LAIDLAW STUART, Appellant—*A. G. Murray.*

AGAINST

ROBERT MURRAY, Respondent—*Dickson.*

POACHING—STATUTE 2 AND 3 WILL. IV., c. 68 (Day Trespass Act)  
 —STATUTE 43 AND 44 VIC., c. 47 (Ground Game Act)—PERSON  
 AUTHORISED TO SHOOT RABBITS.—A person who had been invited  
 by letter by a farmer to stay with him for a week and shoot  
 rabbits was charged with an offence under the Day Poaching  
 Act as having been upon the lands of the farm without leave  
 from the proprietor, in pursuit of game. The complaint did not  
 set forth anything as to the terms of the lease, nor was it put in  
 evidence, and the accused was acquitted by the Sheriff. An  
 appeal from his judgment was *dismissed*, the Lord Justice-Clerk  
 and Lord Young being of opinion that the accused was duly  
 authorised at common law to kill rabbits, and was also a person  
 who might be authorised, and had been duly authorised, by the  
 tenant under the provisions of the Ground Game Act to kill  
 rabbits, Lord Craighill concurring, but solely on the ground that  
 there was nothing in the complaint or the evidence to indicate  
 that the tenant's common law right to kill rabbits himself or  
 allow others to do so had been excluded by the lease.

No. 71. THIS was an appeal upon a Case stated at the instance  
 Stuart of the Procurator-fiscal of Midlothian, ROBERT LAIDLAW  
 v. STUART, against a judgment of acquittal pronounced in  
 Murray. the Sheriff-Court at Edinburgh, upon a complaint at his  
 High Court, instance against ROBERT MURRAY, waiter, Longstone  
 Nov. 13. Inn, Colinton, which charged a contravention of section 1  
 Appeal. of the Day Trespass Act, by being in search or pursuit  
 of rabbits upon the farm of Oatslie, on the estate of

Dryden, in the parish of Lasswade, without leave of the proprietor, Sir Simon Macdonald Lockhart, of which farm Robert Buchan was tenant. The complaint did not set forth or make any reference to the terms of the lease, and it was not produced.

The Case stated that the tenant, Buchan, invited a friend, the respondent, Robert Murray, to stay with him on these terms :—‘Dear Mr Murray,—As I promised you some time ago a day at the rabbits, I shall be glad to have your company next week, and don’t come to run away in a day. Stay all the week and see how many you can shoot.’

Murray went on 2d September, three days after receiving the invitation, and on the forenoon of the 3d, while in a turnip field upon the farm, was stopped in the shooting by a policeman, to whom he gave up his gun. Murray had taken out a gun licence on 2d September.

He was thereafter charged in the Sheriff-Court on the above complaint, and the Sheriff (Rutherford) ‘found that the alleged contravention of the statute 2 and 3 Vict., c. 68, was not proven, and he therefore assoilzied the respondent.’

The following were the questions of law stated in the case on appeal for the Procurator-fiscal :—‘(1) Whether the complaint was relevant or not? (2) Whether the respondent was a member of the household of Buchan, the tenant of Oatslie, resident on the land in his occupation, and duly authorised by him, in writing, to kill and take ground game with firearms, within the meaning of the Ground Game Act, 1880, 43 and 44 Vic., c. 47 ?<sup>1</sup> (3)

1884.

No. 71.

Stuart

v.

Murray.

High Court,

Nov. 13.

Appeal.

<sup>1</sup> Statute 43 and 44 Vic., c. 47 (The Ground Game Act).

Section 1.—‘Every occupier of land shall have as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land : provided that the right conferred on the occupier by this section shall be subject to the following limitations.’

Subsection 1.—‘The occupier shall kill and take ground game

1884.

No. 71.  
Stuart

v.

Murray.

High Court,  
Nov. 13.

Appeal.

Whether the respondent did or did not commit a trespass within the meaning of the statute 2 and 3 Will. IV., c. 68 ?'

A. GRAHAM MURRAY, for the appellant.—The complaint was here quite relevant. It is not necessary, since the passing of the Ground Game Act, to allege in such a complaint, that the respondent was not the occupier of the land, or that he had not the permission of the occupier. The complainer need not, by the averment, exclude everybody who cannot be a trespasser. The object of the appeal is not to obtain a reversal of the judgment of acquittal by the Sheriff, but to obtain the opinion of the Court upon the second and third questions in the case. The important question raised is, whether the respondent was excused from the enactment in the Day Trespass Act by the alleged permission contained in the invitation which was founded on. Whether the occupier of the land, the farmer, had power to give the permission relied on. We contend he had not.

THE LORD JUSTICE-CLERK.—How do you say this man was a trespasser ?

GRAHAM MURRAY, for the appellant.—The respondent here was not a member of the tenant's household, and did not belong to the privileged persons to whom, in terms of the Ground Game Act, 1880 (43 and 44 Vic., c. 47, sec. 1), permission could be given. Under that Act the tenant *had* power himself to shoot the ground game, but his right to authorise others to do so is limited by the Act to 'members of his household resident on the

---

only by himself or by persons duly authorised by him in writing.

'(a.) The occupier himself and one other person authorised in writing by such occupier shall be the only persons entitled under this Act to kill ground game with firearms ;

'(b.) No person shall be authorised by the occupier to kill or take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bona fide* employed by him for reward in the taking or destruction of ground game.'

land in his occupation ; persons in his ordinary service on such land, and any one other person *bona fide* employed by him for reward, in the taking and destruction of ground game.' The respondent here did not come under any of these descriptions of persons.

1884.

---

No. 71.  
Stuart  
v.  
Murray.

---

High Court,  
Nov. 13.

---

Appeal.

LORD YOUNG.—At common law, and apart from contract or reservation of any kind, a farmer has power to shoot rabbits, and I would hold that he is entitled to invite his friends to do so also.

GRAHAM MURRAY, for the appellant.—The law on this matter is contained in the Ground Game Act and the Day Trespass Act, and the cases which have been decided. In the case of *James v. The Earl of Fife*, High Court, Jan. 28, 1879, Couper, vol. iv., p. 321, it was held that a son who assisted his father, the tenant, in the management of the farm, became a trespasser on his father's farm when he went in pursuit of game. Further, I am prepared to produce the lease under which the occupier possessed, and show that he had no right to give leave to any one.

LORD YOUNG.—We cannot reverse the judgment of the Sheriff, on the footing that the contract between the parties was not laid before him. The respondent was quite entitled to kill rabbits with the consent and authority of the tenant, whose authority to give that consent was not disproved.

GRAHAM MURRAY, for the appellant.—The purpose of the Ground Game Act was to enable occupiers of land, by killing ground game, to protect themselves from injury and loss, and was not to extend their privileges ; on the contrary, the statute forces the rights of proprietors in regard to ground game. The respondent was not a member of the farmer's household, or a resident on the farm in the sense of the statute. The word 'resident' is used in the statute as meaning ordinary resident. The occupier's power to give authority to kill is measured by being limited to the privileged classes specified in the statute, and to 'one other person *bona fide* employed for hire.' He is not allowed to give leave to any one, and even the person from



1884. among the privileged classes, who is authorised, must  
 No. 71. have, in terms of the Act, a written permission in his  
 Stuart possession, otherwise he is not to be deemed to be an  
 v. authorised person. I ask the Court to find that the  
 Murray. respondent was not a member of the tenant's household,  
 High Court, resident on the land in the occupation of the latter, and  
 Nov. 13. duly authorised by him in writing to kill ground game  
 Appeal. within the meaning of the Ground Game Act.

DICKSON, for the respondent. — Both at common law and by statute, the respondent had a perfect right to kill ground game on the land in question. The case contains no statement that there was any reservation of the ground game by the landlord in the tenant's lease, or that there was any contract in the matter. The respondent was therefore duly authorised. The invitation was also a sufficient written authority, in terms of the statute, and the respondent was at the time libelled a member of the tenant's household resident on the land, in the sense of the Ground Game Act. It is also admitted that Smith the constable, who charged the respondent with being a trespasser, and asked to see his written permission, had no concurrent right to take and kill ground game, and was not authorised to make the demand (43 and 44 Vic., c. 47, Ground Game Act, 1880, section i., subsection c). The appellant cannot, therefore, found upon the allegation that no written permission was produced by the respondent. There was no failure to produce a written permission. Besides, it is well settled at common law that apart from contract or reservation, there is no obligation on the part of a tenant to abstain from shooting rabbits. And when the right to shoot rabbits has not been reserved, the tenant has right to give permission to shoot them to anyone he pleases. *M'Adam v. Kennedy Lawrie*, High Court, 1st March 1876, Couper, vol. iii., p. 223 — opinion of Lord Young; *Calder v. Robertson*, High Court, 6th Nov. 1868, Couper, vol. iv., p. 131; *Lawrie v. M'Arthur*, High Court, 29th October 1880, Couper, vol. iv., p. 346.

This is an *a fortiori* case to all these cases. There was in none of them express authority to do the act complained of. This is not the case of a person who is lawfully upon the land for one purpose, proceeding to do the unlawful act of going in pursuit of game. It is the case of a person who is on the land with a special authority to do the very act he is charged with. There was no reservation of the ground game proved. The tenant was, therefore, quite entitled to give the authority; and even supposing that he had no right to give it, that could not bring the case up to one of trespass. In no view, therefore, could the respondent here be held to be a trespasser. But further, we contend that the complaint was irrelevant. Now that we have got the Ground Game Act, such complaints should not only negative have been obtained from the proprietor, but in order to be relevant, must aver that the respondent is not the occupier of the land in question, and is not a person who has been duly authorised by the occupier. The appeal ought, we contend, to be dismissed.

THE LORD JUSTICE-CLERK.—In this case the appellant does not ask us to reverse the judgment of acquittal appealed against, and find the respondent guilty—and I think he is very well advised in that course; but it is said that the appellant desires the opinion of the Court upon the second question stated in the Case, which is, whether the accused person was a member of the household of the tenant-farmer resident on land in his occupation, and duly authorised by him to kill rabbits under the Ground Game Act? And that raises two questions, the first being, whether, without the provision of the Ground Game Act, there is room for suggesting that there has been a trespass committed within the meaning of the Day Trespass Act? and second, whether the authority here given by the tenant was a sufficient authority, in terms of the Ground Game Act, to confer upon the respondent a right to shoot rabbits? In regard to the first of these questions raised, much discussion has

1884.

No. 71.  
Stuart  
v.  
Murray.High Court,  
Nov. 13.

Appeal.

1884.

---

No. 71.  
Stuart  
v.  
Murray.

---

High Court,  
Nov. 13.

---

Appeal.

---

taken place, and a good deal of subtlety expended to determine whether a man who is otherwise entitled to be on the ground of the farm by the consent of the tenant, and must be so in pursuit of his business, could trespass when, without the knowledge of the tenant, he went in pursuit of game. More than once I have expressed doubt on the question, but it has been deliberately considered and decided, and since then I have not felt myself at liberty to act on those doubts. But here the circumstances were somewhat different from those under which it has as yet arisen, even without the assistance of the Ground Game Act. This is the case of a tenant specially inviting his friend the respondent to come on the land and stay with him for the special purpose of shooting rabbits. Now that being so, I have a strong impression that if the persons prosecuted in the cases which have been cited to us could have presented such a case as this, a different decision would have been arrived at. But be that as it may, I am not prepared to alter these judgments on such a distinction as that. I think the distinction between leave given and tacit acquiescence makes a different ground of judgment. But I am clearly of opinion that under the Hares and Rabbits Act the tenant is entitled to ask a friend to come and reside with him for a time and shoot rabbits with him : and if he comes he was resident with the tenant for the time ; and the Act does not specify whether the residence is to be temporary or permanent. No better test of the responsibility and respectability of the person who is to shoot could be desired than that the farmer asks him to come and live in family with him. That is what the act desires ; in short, in my opinion, he was a person resident on the farm in the sense of the Act. Therefore I am not inclined to give any weight at all to this prosecution, and am for dismissing the appeal.

LORD YOUNG.—That is my opinion also, and I concur in all the grounds stated by your Lordship. I think it is sufficient for the decision of the case that there is no

contract averred or established which would interfere with the common-law right of the tenant to shoot rabbits or give that right to any person he pleased. In that view, which I think is a sound one, there is no occasion for appealing to the provisions of the Ground Game Act at all.

1884.

---

No. 71.  
Stuart  
v.  
Murray.

---

High Court,  
Nov. 18.

---

Appeal.

And with reference to that Act I may observe that I doubt the relevancy of this complaint although I don't think it necessary to decide the question.—I mean that I doubt whether it is sufficient to set forth that the trespass was trespass simply as being without leave of the proprietor, and to convict of trespass simply by negating the leave of the proprietor without anything being proved with reference to the tenant's right; for I think that there may be presence on the land and in pursuit of rabbits without leave of the proprietor, and yet that there may be no trespass under the Act. But I have no doubt whatever that since as before the passing of the Ground Game Act, that tenants are entitled to destroy rabbits, either by themselves or by others with permission from them: and there is no doubt that the tenant in this case had permission to kill rabbits.

But although it is not strictly necessary for the decision of the case, it is reasonable that we should give an answer to the second question put to us in the case. It has been argued, and having an opinion upon it I think we should state it. I agree with your Lordship.

I don't think there should be any excessive strictness in determining to whom farmers may give leave to kill rabbits and ground game generally. The Act says, 'No person shall be authorised by the occupier to kill or take ground game, except members of his household resident on the land in his occupation,' or certain other persons with whom we have nothing to do here. I think a visitor may very well be a member of a man's household, and resident in his house in the sense of the statute. To what length the visit must extend I should not like to define, nor is it necessary. But I think that

1884. a man who was *bona fide* invited for a week and  
 resident with the farmer may be regarded as a member  
 of his household to whom permission may be given: and  
 unless we are to go the length of saying that a visitor is  
 not to get leave at all, I think he may have it. If a  
 farmer invites his nephew for a year or six months or  
 one month, would that do? or if he asked a schoolfellow  
 of his son's to stay with him for his holidays, would the  
 lad not be fairly a member of his family 'resident in his  
 house'? It is just with reference to these sort of  
 questions that I should not be disposed to deal strictly,  
 assuming always that there is *bona fides* in the matter.  
 Therefore in this matter really of criminal law, I should  
 hold that the invitation to stay, and the permission to  
 shoot rabbits, was a good defence against a criminal  
 charge, and I should answer the second question as your  
 Lordship has done.

LORD CRAIGHILL.—I also think that the appeal should  
 be dismissed, and simply on the ground that there is  
 nothing set forth in the Case to interfere with the opera-  
 tion of the common law. The tenant had a right at  
 common law to shoot rabbits, and to communicate that  
 right. No contract has been averred, and it is not ex-  
 cluded by any title produced. I reserve my opinion on  
 the second question raised in the case until the question  
 occurs.

The following was the Interlocutor:—

'*Edinburgh, 13th November 1884.* — Having con-  
 sidered this case, and heard counsel for the parties, Dis-  
 miss the appeal, affirm the determination of the inferior  
 Judge, and decern: Find the respondent entitled to  
 expenses, which modify to five guineas; for which, and  
 one guinea as the dues of extract, decern against the  
 appellant.'

Agent for the Appellant—GEORGE M. WOOD, S.S.C.

Agent for the Respondent—PETER MORISON, S.S.C.

Present.

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

ANN ROSS or KAY, Appellant—*Burter*.

AGAINST

ANDREW GEMMELL, Respondent—*Darling*.

**B**REACH OF CERTIFICATE—GROCER, LICENSED, ENTERTAINING FRIENDS —STATUTE 25 AND 26 VIC., c. 35, SEC. 2 (Public-Houses Amendment (Scotland) Act, 1862).—A person holding a grocer's certificate was convicted of a breach of it, in so far as she had trafficked in or given a pint of ale to each of two persons named to be consumed on her premises. It was proved that she had 'gratuitously given the ale by way of a treat' to the two persons named in the kitchen behind her shop, between ten and eleven P.M.

**H**eld that she had not 'given' the ale to be consumed on the premises in the sense of the Public-Houses Acts Amendment Act, 1862, and conviction therefore quashed.

THIS was an appeal upon a Case stated at the instance of ANN ROSS or KAY, who held a grocer's certificate for the sale of exciseable liquors in her shop in Cockenzie, not to be consumed on the premises, against a conviction and sentence pronounced in the Justice of Peace Court at Haddington, upon a complaint at the instance of the respondent, the PROCURATOR-FISCAL, charging a contravention of the certificate held by her in virtue of The Public-Houses Acts Amendments (Scotland) Act, 1862, in so far as on the date libelled she 'did traffic in or give exciseable liquors to be drunk or consumed on her premises in Cockenzie, inasmuch as she did traffic in or give a pint of ale to each of the following persons,' &c., &c., 'to be drunk or consumed within the kitchen of her said premises, a shop in the parish of Tranent and county of Haddington, although the certificate in her favour only allows her to supply exciseable liquors to be consumed elsewhere.'

The Case stated that it was proved in evidence that the 'Fisher-man's Walk,' a holiday in Cockenzie, was held on the day libelled,

1884.

No. 72.  
Kay  
v.

Gemmell.

High Court,  
Nov. 13.

Appeal.

1884. the 19th of September ; that on that day the licensed premises  
 No. 72. were in charge of Robert Kay, son of the appellant—she being in  
 Kay Edinburgh ; that about six P.M. of the said day he invited Marshall  
 v. and Flockhart into the premises to have something to drink ; that  
 Gemmell. they did not then enter, but agreed to do so later ; and that in the  
 High Court, kitchen behind, and immediately communicating with, the shop,  
 Nov. 13. between ten and eleven at night, the said Robert Kay gave each of  
 Appeal. them a pint of ale, which he took out of the shop to them, and  
 which they drunk or consumed in the kitchen ; and that he did not  
 exact any money from them for the ale, the giving of it being a  
 treat to the men. It was also proved that when the constables  
 went into the kitchen and found the men there, two or three  
 bottles were standing on the tables uncorked. The shop was open  
 at the time the men got the liquor in the kitchen, they having  
 entered the kitchen through the shop. The Justices, on the  
 evidence, convicted the appellant ‘of the contravention charged,’  
 and adjudged her to pay the sum of ten shillings of penalty, with  
 eight shillings and sixpence of expenses, and in default of payment,  
 within fourteen days, to be imprisoned for seven days.

The questions of law for the opinion of the High Court were :—

Whether the charge, as laid, was relevant ?

Whether the appellant, having gratuitously given a pint of ale to each of the men in question, by way of a treat, in the kitchen behind the shop (it being part of the licensed premises), to be drunk or consumed there, did so ‘give’ ale to be drunk or consumed on the licensed premises in the sense contemplated by the statute and the certificate, and did thereby commit a breach thereof ?

Whether the conviction as stated was in proper form ?

BAXTER, for the appellant, contended.—This is an alternative charge of selling *or* giving, and the conviction is general—of the contravention charged : Second, this was a case of private hospitality, and did not amount to a breach of certificate. It had already been decided in the cases of publicans and hotelkeepers that where they treated their friends gratuitously after hours that was not to be held a contravention. *Smith v. Stirling*, High Court, Mar. 6, 1878, Couper, vol. iv., p. 13 ; *Gemmell v. Flett*, High



Court, Oct. 27, 1882, X. R., Jus. Cas., p. 17, Couper, 1884.  
 vol. v., p. 150; *Hogarth v. M'Dougall*, High Court, No. 72.  
 Nov. 6, 1878, Couper, vol. iv., p. 128; *Boyd v. Kay*  
*M'Jannet*, High Court, 21st May 1879, Couper, vol. r.  
 Gemmell.  
 High Court,  
 Nov. 13.

DARLING, for the respondent.—While we must guard against invading the sanctity of private life, there is no proof in the case that the *species facti* amounted to a use of private hospitality. The case is quite distinguishable from the cases cited, especially from the case of *Stirling*, where there was a distinct finding that the person charged was giving a private party. In this case it is not even stated that the men were friends of the grocer or her son.

LORD YOUNG.—I think this case is really governed by what we have already decided in the case of the publican in *Smith v. Stirling*. All the considerations which led to that judgment are present here, and everything that was important in the respondent's argument in the present case occurred there also, as they were stated very clearly and powerfully by Lord Craighill, in his opinion in that case. But the majority of the Court thought that the statutory regulations as to the certificate applied to the trader, not in his private but in his trading capacity, and that he could no more reasonably be restrained from giving exciseable liquor to his friends than he could be from giving them to himself within his own premises. So here, in the case of the grocer, I think, though he is to be restrained from selling or giving, as a grocer dealing in those articles, any exciseable commodity to be consumed on the premises, yet, pursuing the analogy of the publican, he is under no disability as to himself taking liquor on his own premises, or giving it to members of his family or establishment, or to his friends to be consumed there. He may dine or lunch in his kitchen or back-shop, though that is part of his licensed premises, without transgressing any rule of the statute. He is not there

Appeal.

1884.

No. 72.

Kay  
v.

Gemmell.

High Court,  
Nov. 13.

Appeal.

acting in a capacity in which he can commit any offence against the conditions of his license. Of course if there be any dexterous avoiding of the provisions of the statute, according to their true meaning, under the cover of hospitality, or anything of that sort, we should certainly not interfere with the conviction: but it is for the Magistrates to detect that, and I assume it generally will be detected. Such cases may occur, and when they do they are quite proper cases for conviction. But I assume that the present case is a case of *bona fide* treating on the part of the grocer's son, a thing no more to be restrained than the grocer himself is to be restrained from lunching or dining on his own premises. Only guarding myself by saying that I do not understand that the Magistrates have here indicated that there existed anything whatever of the nature of a device or contrivance for eluding the statute, I am for setting this conviction aside.

LORD CRAIGHILL.—I am of the same opinion, because I think the decision of this case must be governed by that in the case of *Smith v. Stirling*. The principle recognised there was that the case was outside the restrictions imposed as conditions of the certificate, because what was done was done not in the way of trade at all, but by a person who, though a publican, was acting as though he were not a person who held a license at all, and might have been done by one who did not hold a license or trade in liquor.

The LORD JUSTICE-CLERK.—I concur.

The following was the Interlocutor:—

‘*Edinburgh, 13th November 1884.*—Having considered this case and heard counsel for the parties, Sustain the appeal, reverse the determination of the Justices, and decern: Find the appellant entitled to expenses, which modify to five guineas; for which, and one guinea as the dues of extract, decern against the respondent.’

Agents for the Appellant—MESSRS BROWN & PATRICK.  
Agent for the Respondent—W. ELLIOT ARMSTRONG, S.S.C.

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

JAMES ALSTON DYKES, Appellant—*The Lord Advocate (Balfour)*  
*and Goudie.*

AGAINST

WILLIAM DIXON (Limited), Respondents—*J. P. B. Robertson and*  
*Jamieson.*

**APPEAL, COMPETENCY OF—QUESTION OF FACT—STATUTE 38TH VIC., c. 17, SECTS. 23 AND 39 (The Explosives Act, 1875)—STATUTE 44TH AND 45TH VICT., c. 33, SECT. 6 (Summary Jurisdiction (Scotland) Act, 1881)—EXPLOSIVES—EXPLOSIVE STORES, DUE PRECAUTIONS TO GUARD.**—The occupiers of a licensed store for mixed explosives, who had fully complied with all the structural requirements in the Explosives Act, 1875, to prevent accidents and the access of unauthorised persons, having been charged upon a complaint before the Sheriff with a contravention of sections 23 and 39 of the Act, in so far as they had failed, during a period specified, to take all due precaution for preventing unauthorised persons having access to said store, and particularly to provide a guard for preventing such persons from having access thereto, in consequence of which the store was entered on three specified occasions, and a large quantity of dynamite was stolen, the Sheriff, 'on the evidence, held that the respondents took all precautions obligatory or considered practicable at the time,' and found the charge not proven.

The Fiscal appealed, and contended that the Sheriff had fallen into an error in law in holding that the occupier of a store which had been proved to be structurally insufficient to prevent successful invasion by violence, had, in terms of the Act, taken all due precaution, where no provision was made for guarding the same. Held that there was no question of law raised in the case, and the appeal dismissed.

Opinion, That the duty of guarding such a store, which has been made structurally sufficient to the satisfaction of the official inspector, does not fall upon the owner or occupier of the store but upon the police rates.

THIS was an appeal on a Case stated from the Sheriff Court at Hamilton (J. B. L. Birnie, Sheriff-substitute), at the instance of JAMES ALSTON DYKES, the Procurator-fiscal, against a judgment of acquittal of the respondents,

1885.

No. 73.  
Dykesv.  
Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.

1885. WILLIAM DIXON (Limited), incorporated under the Companies Acts, coal and iron masters, Carfin, in the parish of Bothwell and county of Lanark.

No. 73.  
Dykes  
v.

Wm. Dixon  
(Limited).

The Case stated.—

High Court,  
Feb. 7.

Appeal.

This is a cause brought in this Court, on the 5th November 1884, under the provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of the appellant against the respondents, the complaint in which sets forth that the respondents have contravened the Act of Parliament passed in the thirty-eighth year of the reign of Her Majesty Queen Victoria, chapter seventeen, entitled 'The Explosives Act, 1875,' in so far as they, being at the date hereinafter libelled occupiers of the store for mixed explosives, situated near Carfin aforesaid, which is and was at said date licensed by the Local Authority for the keeping therein of mixed explosives, under Division D, in virtue of the Order in Council, No. 6, of date 27th November 1875, and it being enacted by the twenty-third section of said Act, that

'The occupier of every factory, magazine, store, and registered premises for gunpowder, and every person employed in or about the same, shall take *all due precaution* for the prevention of accidents by fire or explosion in the same, and for preventing unauthorised persons having access to the factory, magazine, or store, or to the gunpowder therein, or in the registered premises, and shall abstain from any act whatever which tends to cause fire or explosion, and is not reasonably necessary for the purpose of the work in such factory, magazine, store, or premises. Any breach (by any act or default) of this section, in any factory, magazine, store, or registered premises shall be deemed to be a breach of the general rules applying thereto ;' and it being farther enacted by the thirty-ninth section that, 'subject to the provisions hereafter in this part of this Act contained, Part 1 of this Act relating to gunpowder shall apply to every other description of explosive in like manner as if those provisions were herein re-enacted with the substitution of that description of explosive for gunpowder.' Yet nevertheless during the period between the 17th day of April 1884, and the 26th day of July 1884, during which period the said store was used for the keeping therein of gunpowder and dynamite, the said respondents failed to take all due precautions for preventing unauthorised persons having access to the said store, or to the gunpowder or other explosives therein, and in particular failed during the said period to have a person or persons constantly to guard the said store for preventing unauthorised persons having access thereto or to the gunpowder or other explosives therein, in consequence of which failure the said store, which had previously, on or about the 1st day

of November 1879, as also on or about the 20th day of August 1882, been entered by unauthorised persons, by whom explosives were stolen, was, on or about the night of the 24th, or morning of the 25th days of July 1884, entered by unauthorised persons, by whom a quantity of dynamite, amounting to seventy lbs. weight or thereby, was stolen, whereby the respondents are liable to a penalty not exceeding £10 ; and it craves the Sheriff to convict them of the contravention, and to adjudge them to suffer the penalties provided by the Act, as modified by section 6 of the Summary Jurisdiction (Scotland) Act, 1881.

1885.

No. 73.

Dykes

v.

Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.

The respondents stated the following preliminary objections—(1) that the names of the unauthorised persons said to have entered the store are not specified, and (2) irrelevancy in respect that there is no statutory offence set forth.

I repelled these objections and allowed a proof, and the following facts were proved or admitted.

The store is in every respect constructed as required by the statute and Orders in Council. It is built of brick, divided into two apartments, the one for powder and the other for dynamite, and each having a door with an iron plate on the outside, three cross-bars on the inside two feet six inches long, six inches broad, and an inch and a half thick, riveted with copper nails, and an iron cross-bar covering the keyhole.

It is surrounded by a strong palisade. It has been inspected by an inspector, appointed by the Local Authority, several times yearly since 1875, and the present inspector, who has held office since 1875, can suggest no mode of strengthening it.

The doors were strengthened after the store was broken into in 1882, and the inspector says Messrs Dixon were at all times anxious to do what they could to make the place secure. The store is distant 200 yards from any occupied house, and stands on a road leading to a pit which is sometimes worked at night, and to the adjoining farm. It has been three times broken into—once in November 1879, when dynamite was stolen ; once in August 1882, when gunpowder was stolen ; and again in July this year, when dynamite was stolen. It was officially inspected after each of these occurrences, and every suggestion made by the inspector in order to provide for its further security was at once given effect to by the respondents. On the two first occasions the lock was forced, and on the last the standard of the door was forced. On none of the occasions was it discovered by whom the depredation had been committed.

The respondents, prior to the present complaint, were not directed or requested to have a guard. There is no guard at any place where explosives are kept in the Wishaw district, within which the

1885.  
 No. 73.  
 Dykes  
 v.  
 Wm. Dixon  
 (Limited).  
 High Court,  
 Feb. 7.  
 Appeal.

store is situated, and neither the inspector, nor Mr Johnstone, the manager of Messrs Nobel's Explosives Company, who was examined for the respondents, is aware of any store guarded by the occupier. Mr Johnstone knows two instances—one near Cork, and the other near Belfast—where a magazine is guarded by the police, but in these cases the expense is borne by the police rates. There are in the United Kingdom about 100 factories, 2500 magazines and stores, upwards of 20,000 registered premises, all licensed under the Explosives Act, and also a number of persons licensed by police certificate. A magazine may be licensed to contain any quantity of dynamite; a store 2000 lbs.; registered premises either 15 or 60 lbs.; and police certificates entitle the holder to keep 10 lbs. Mr Johnstone estimates the cost of guarding magazines and stores at between £300,000 and £400,000, but does not distinguish between gunpowder or dynamite stores.

The following documents were produced. [Here followed list of eight documents.] Which documents are here referred to and held as forming part of this case.

On the evidence, I held that the respondents took all precautions obligatory or considered practicable at the time, and I found the complaint Not Proven, and assolized the respondents.

The questions in law stated for the opinion of the High Court of Justiciary were :—

Whether the said complaint is relevant? and second, On the facts proved, were the respondents guilty of the offences charged?

The LORD ADVOCATE (BALFOUR) for the appellant.—The question here is, Whether, where it appears from the facts, that the structural arrangements of a store for explosives are insufficient to prevent the entry of thieves or other unauthorised persons by violence, there arises in terms of the statute a legal duty on the owners or occupiers to supply a watch to guard the store. Under the Explosives Act, 1875, provision is made for the keeping and protecting of explosives in three kinds of premises. In the first place, in factories or magazines, which are not precisely convertible terms. *Secondly*, in stores. And *lastly*, in registered premises. The present case relates to a store, and we have to do with that part of the statute, commencing with section 15, which is

entituled 'Consumer's Stores for Gunpowder, Licensing and Regulation of Stores,'—it being kept in mind always that the provisions relating to gunpowder are by section 39 declared to apply to every other explosive. Stores may be licensed to contain 2000 lbs. of dynamite, and the statute contains a number of general detailed rules for licensing and registering of them, and for securing the protection of the building and the safety of the public. These have special reference to the particular kind of building, but they are followed by supplemental provisions, commencing with section 23, which apply indiscriminately to factories, magazines, stores, and registered premises [reads]. Our contention is that the owners or occupiers of stores are bound to observe not only the special regulations which follow clause 15, but the supplemental provisions also. And more particularly that it is obligatory upon them '*to take all due precautions*' for preventing unauthorised persons having access to the store. These supplemental provisions are purposely left, in very general language, to cover variations of time, place, and circumstances. There is no dispute in regard to the facts of the case, which are stated by the Sheriff as proved, and the question is, Given these facts as proved, does obligation under the statute result? The Sheriff states in the Case that the premises have been thrice before broken into, and that there is no guard placed upon the premises. It is also stated that the inspector could suggest no mode of strengthening the premises structurally; and the prosecutor proceeded upon the assumption that the store is structurally perfect, and contended that the obligation of watching arose because of the store having been in fact broken into. The Sheriff found that the complaint was relevant, leaving the question whether all due precautions have been taken to be determined upon a proof of time, place, and circumstances, and following such proof, he has held that the 'respondents took all precautions obligatory or considered practicable.' We contend that apart from the question

1885.

No. 73.  
Dykesv.  
Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.



1885. of relevancy, the question so determined was a question of law.

No. 73.  
Dykes

v.  
Wm. Dixon  
(Limited).

High Court,  
Feb. 7.

Appeal.

LORD YOUNG.—Then do you maintain the proposition—that, where a store has been broken into once or twice, there must in point of law be a watch?

THE LORD-ADVOCATE.—That is hardly our contention. The question is a mixed question of law and fact. We say that, apart from the facts, there is under the statute an obligation to watch, the owner taking his chance of the consequences of not watching. And secondly, upon the facts—though not as part of the facts—there arose an obligation to watch: and that of these facts the most important are, first, that the store although structurally perfect had been found not sufficient to effect the keeping out of unauthorised persons, and second, that it is therefore a store to which the provisions in section 23 specially apply. It is a store in reference to which it has been proved that some other precaution is due and necessary. The statute in using the words ‘all *due* precaution’ contemplated the arising of a question in law; and the Sheriff in deciding that the respondents ‘took all precautions that were obligatory’ decided a question of law. The statute says—*Esto*, that the store is structurally perfect, and it be conceded that it has been frequently broken into, the obligation under the statute is not exhausted by such structural sufficiency, all due precaution must be taken. That is just all other due precaution must be taken, and the only additional precaution that can be said to be due and necessary in the circumstances being the usual precaution of watching, it was the duty, we contend, of this company to provide a watch. The question, whether any particular precaution is due, or in other words, obligatory, is a question depending upon the circumstances of each case. If during certain times it were to arise that unauthorised persons were obtaining access to dynamite *per fas et nefas*, then it must be confessed that a duty would arise of providing some further precautions than structural sufficiency. If

the case had been one where the overcoming of the structural arrangements could not have been anticipated such duty might not have arisen, but the fact of the occurrence of the proved previous thefts here forewarned the respondents of the insufficiency. And where circumstances have shown that a store is not structurally sufficient to keep out burglars, the statute, we contend, imposes the duty of taking the only other precaution likely to be effective, viz., that of watching. No precautions are by the statute, we contend, legally sufficient unless they are in fact sufficient. When it is said, as the Sheriff here says, that the respondents' store is structurally sufficient, but did not prevent unauthorised interference, that nothing more could be suggested and nothing more was done, and that the complaint is not proven, and the respondents are therefore innocent, he fell, we contend, into the error in law of finding that the respondents having taken all structural precautions that were necessary or possible, the statute imposed upon them no duty of taking any other precaution.

LORD YOUNG.—Your argument is that wherever a store structurally perfect is once broken into, that gives rise to a duty of watching, that being the only precaution which could be said to be 'due' in the circumstances. Now the question in a civil case, whether a thing has been done with due care—which is just the same thing—has always been considered a question for the Jury as being a question of fact.

THE LORD ADVOCATE.—True ; but subject, we submit, to the direction of the Judge as to what was the duty in the circumstances.

LORD YOUNG.—And if this had been a Jury trial then what do you say should have been the direction of the Judge.

THE LORD ADVOCATE.—He ought to have directed that where it is found that the store is proved not to be burglar proof, the duty of taking the usual, and therefore obvious, precaution of watching arose. That is a mixed

1885.

No. 73.

Dykes

v.

Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.

1885. conclusion of law and fact, and as law enters it review  
by this Court is not shut out.

No. 73.  
Dykes

v.  
Wm. Dixon  
(Limited).

High Court,  
Feb. 7.

Appeal.

LORD YOUNG.—The question seems to resolve into, whether the expense of watching is to fall upon the respondents or upon the rates.

The LORD ADVOCATE.—That is so. This is a test case for the purpose of instructing the Sheriff upon the law. And our contention is, that the taking of this precaution is necessary for the safety of the lieges, and being an incident of the making use of dangerous explosives in business, the expense may, and ought justly and legally be held to fall upon the user of the explosive. Dynamite is a cheap substance, and the theft of it, in such quantity as can generally be stolen, involves no great loss ; and just for that reason little care is apt to be taken to prevent it being stolen. If it had been valuable the owners would, in their own interest, have used all due precautions to prevent its loss ; but as it is cheap, they are not assiduous in taking care of it. For that reason the Legislature has said to the user of explosives, If you take all proper structural precautions, to the satisfaction of the inspector, you will have a license ; but that is not sufficient, we provide farther that, in addition to these, you are to be bound to use all due precautions to prevent the access of unauthorised persons. If you do not succeed in the one way, you must do it in another. The Sheriff has found it sufficient to take the structural precautions alone, and has acquitted. This Court ought, we submit, to recall the judgment and answer both questions in the affirmative.

J. P. B. ROBERTSON and JAMIESON, for the respondents.—We contend first, that there was here no relevant complaint. The Lord Advocate's contention is set aside by the terms of the statute. The statute does not contemplate, as the complaint does, that the absence of persons to guard the store is a neglect of the due precautions enjoined. The precautions imposed upon the owners of stores for preventing the entry

of unauthorised persons are structural precautions only. 1885.

LORD YOUNG.—What interest have you to object to the relevancy of the complaint? The complaint has been found relevant, and you are not appealing. You are defending a judgment competently pronounced upon a relevant complaint, but which is said to be erroneous in law in an appeal by the prosecutor against that judgment, which is a judgment acquitting you.

No. 73.  
Dykes

v.

Wm. Dixon  
(Limited).

High Court,  
Feb. 7.

Appeal.

JAMIESON, for the respondents.—Then, upon the other question raised, we contend that the judgment appealed against is a judgment upon the facts, and that there is no question of law for this Court to consider. The question was, whether or not due precautions were used, and the Sheriff has held it proved on the evidence, that the respondents did take all precautions obligatory, or considered practicable at the time, and has therefore acquitted. The statute does not, we contend, impose the duty of watching on the owner of an unwatched store whenever it is broken into. Such a contention is not borne out either by the terms of the statute or by the Orders in Council. These have all reference to structural precautions, and there is not a word in them to suggest that any other precautions are obligatory. The Orders in Council, particularly Orders V. and VI., contemplate, with reference to the keeping out of unauthorised persons, structural precautions only. There is no limit in the Act to the expression due precaution, and the question, what amounts to due precaution, is one of pure fact. The statute contemplates that, if the structure is made sufficient to the satisfaction of the inspector, the owner has done all that is obligatory or practicable in the way of precautions against unauthorised entry; and if from the state of the times, or other cause, any guarding of the store becomes necessary, that is a matter of police, and no such obligation as that contended for lies upon the holder of a license.

At advising—

1885.

No. 73.  
Dykes

v.

Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.

LORD YOUNG.—I must say that this has appeared to me, from the time I have read the Case, to be a very clear matter, and I cannot regard it as an important matter, the only question being the practical question, Whether the policemen to guard these premises are to be paid by the occupier of the premises or out of the police rates. There is no further practical question than that.

There are numerous such stores in this country and in Ireland, and where the public authorities are of opinion that the public safety requires a watch, they, in the only cases in which a watch has been provided—have paid for it, that is to say, the police rates have paid for the police told off for duty. There is no case in which a watchman has been provided by the occupier of the premises. That is stated by the Sheriff; and on my questioning the Lord Advocate, he said that he had no reason to doubt the accuracy of the Sheriff's statement.

It appears, in point of fact, that these premises were thrice broken into by violence applied by a housebreaker at night. If it be a legal proposition that the owners of such premises which have been once or twice broken into shall provide a guard—if that is the law under this statute, then the Sheriff's judgment is erroneous, for these premises have been thrice broken into, and yet no watch has been provided. It is very obvious that that proposition could not be maintained without going a step further, and holding that due precautions to keep people out were not provided anywhere as long as the premises were not structurally stronger than those were—in short, strong enough to prevent successful invasion by violence. The proposition must apply to all such cases, and must mean that in point of law there must be a watch; for the fact of violence having been successfully applied only shows the insufficiency in the particular case. But the insufficiency existed before the premises were put to the test, and exists in all other cases where the premises are not stronger, or are not strong enough to resist the successful application of violence for their invasion. I

cannot assent to that as a legal proposition, and it was hardly maintained to us that by the law of Scotland all premises which are not structurally sufficient to resist successful invasion by violence must be guarded by a watchman.

1885.  
No. 73.  
Dykes  
v.  
Wm. Dixon  
(Limited).

High Court,  
Feb. 7.

Appeal.

Then what is the case? The prosecutor represented to the Magistrate, to whom the statute leaves the matter, that the respondents here had not provided due precautions against the access of unauthorised persons. The Magistrate, judging of the whole evidence before him, and as an item, and a material item, of the evidence that the premises had been previously invaded by house-breaking, found the charge not proven in fact. Another Magistrate might have arrived at a different conclusion on the same evidence, just as we know that juries arrive at different conclusions on exactly similar evidence,—in no cases more notably than in cases of theft, where the most common of all offences is laid before the jury. One jury will convict where there is recent possession of the stolen goods not satisfactorily explained, or not explained at all; another jury will acquit. But all that the Judge can direct them is that that is evidence for their consideration quite sufficient in law to authorise them to convict if they are satisfied with it, but that the question whether they are satisfied with it is a question for them, and not a question of law. Therefore, if I had been trying this case with a jury, or directing the Magistrate who was trying it, I should have said to them or him — ‘Those facts which have been proved are all facts for your consideration, bearing upon the ultimate question of fact, which is also, for your consideration, namely whether all due precautions were taken to prevent the invasion of these premises by violence. In three instances the precautions did not prove sufficient; violence was successfully applied to the premises, and some of the explosives were stolen. That is for your consideration—very weighty evidence, which may justify a finding by you that due precautions were not taken,

1885. if that should be your view, but whether that is to be  
No. 73. held as the result is for you to judge.' And the verdict  
Dykes being returned, or the judgment as here, I cannot see  
v. that there is any error in point of law involved, and I  
Wm. Dixon am not at all surprised that the Magistrates declined to  
(Limited). hold that the respondents had failed to take all due pre-  
High Court, cautions when it is not shown that anybody had ever  
Feb. 7. taken more. The premises were admittedly structurally  
Appeal. sufficient, kept locked, all due precautions taken against  
stragglers getting in, people under sixteen not admitted,  
no smoking, no matches—in short, all the precautions  
that anybody is shown ever to have taken. But the  
public authorities announced to the respondents that  
there should be a policeman to guard the premises.  
The respondents decline to pay for that, and say, 'You  
had better pay that yourselves, as you do elsewhere,'  
and the Magistrates decline to hold that they have failed  
to take due precautions because they did not employ and  
pay a policeman. I am not at all surprised at that  
conclusion, but it is sufficient to say that there is here  
no error in law tainting the judgment. I should have  
been very far from saying that there would have been  
any error in law tainting the judgment if the Magistrate  
had arrived at another conclusion, and said—'I think  
that, looking at what has happened here, you ought to  
provide a watchman.' But I cannot see that there is  
any law there. That is a question committed to the  
Magistrate. I should like to put this other illustration.  
In the Court of Session we have a very familiar statutory  
provision, that where cases are tried in the Sheriff Court  
and come here on appeal, we are to pronounce our find-  
ings in point of fact, and they are to be held conclusive  
by the House of Lords. If in such a case we had found  
in point of fact that all precautions which had ever been  
known had been taken by the occupier of such a store—  
that all due precautions had in fact been taken—would  
it be held to be an error in law that we had pronounced  
that to be sufficient which another tribunal thought not



sufficient. Would the difference be held to be upon a legal proposition and not in the estimation of a question of fact? I am very clearly of opinion that there is here no question of law for our consideration.

There is an error in the Case stating that the relevancy of the complaint was for our consideration. I do not doubt the relevancy of the complaint, but I do not think that is a question for our consideration. The appellant was the prosecutor, and the prosecutor cannot appeal against a judgment finding his own libel relevant.

I therefore propose that we should dismiss the appeal with expenses.

LORD CRAIGHILL.—On first looking at this Case I thought it might be said that in one view of the matter a question of law was involved, but on further consideration the conclusion to which I have come is that our decision should be in favour of the respondents—in other words, I fail to see that the provision of the statute is to be construed in the way for which the Lord Advocate has contended. I have come to the conclusion that, as your Lordship has said, there is not a question of law here for us to determine, because practically the question is whether all due precautions were taken—that is to say, all precautions with reference to the circumstances of this particular case—and I have come to the conclusion that that matter is a matter of fact, only which therefore it was for the Sheriff and is not for us to decide.

LORD ADAM.—If the appellant could have maintained successfully that certain precautions had not been taken which had been proved to be essential; if he could have brought the case up to that, and could have made out that, assuming all the facts proved, yet they did not amount to a fulfilment of the statutory obligation, I could have understood that as a question of law. But if it came to be a question of what is due and reasonable precaution, I am clear that that is a question of fact for the judge who tries the case, and nothing but that. The Sheriff has found that all due precautions were taken, and that

1885.

No. 73.

Dykes

v.

Wm. Dixon  
(Limited).High Court,  
Feb. 7.

Appeal.

1885.  
 No. 73.  
 Dykes  
 v.  
 Wm. Dixon  
 (Limited).  
 High Court,  
 Feb. 7.  
 Appeal.

being a question of fact simply, I think we cannot do otherwise than dismiss the appeal.

The following was the Interlocutor :—

‘ *Edinburgh, 7th February 1885.*—Having considered this case, and heard counsel for the parties, Dismiss the appeal, affirm the determination of the inferior judges: Find the respondents entitled to expenses, which modify to seven guineas; for which, and one guinea as the dues of extract, decern against the appellant.’

Agent for the Appellant—CHARLES B. LOGAN, W.S.  
 Agents for the Respondents—W. & J. BURNES, W.S.

---

Present,

LORDS YOUNG, CRAIGHILL, and ADAM.

HER MAJESTY’S ADVOCATE—*R. V. Campbell, A.-D.*

AGAINST

ALEXANDER GILRUTH FLEMING—*Rhind and Hay.*

**THEFT—EMBEZZLEMENT—APPROPRIATION OF MONEY BY FACTOR—THEFT OR EMBEZZLEMENT BY BANK MANAGER—SPECIFICATION—LOCUS—DUTY OF ACCOUNTING—WITNESS—RELEVANCY.**—An indictment bore that ‘you,’ the panel, ‘having received’ certain moneys ‘as factor and on behalf of’ the executrix of a deceased bankrupt, ‘and under the trust and duty that you should forthwith hand over the same to’ the trustee on the bankrupt’s sequestrated estate, ‘for the purpose of the same being divided among the creditors of the said estate, and that you should in no event appropriate the same to your own uses and purposes,’ did steal the sum so received.

Held that as the possession set forth was lawful possession, with merely liability to account, there was no relevant charge of theft. An indictment bore that the panel having acted as subfactor for an heritable securities association from March 1882 to July 1883, and having at various dates in the course of that period received from tenants of the association, who were named, ‘sums of money amounting to £864, 10s. 5d. sterling, and various other sums, being rents and feu-duties of the’ properties belonging to the association, ‘accruing and paid during the period’: and further it being the panel’s duty to account for these rents and

feuduties, and in no event to appropriate them or any part of them to his own uses and purposes, did 'on several or one or more occasions during the period' specified, steal the sum mentioned, or otherwise did embezzle it. 1885.

No. 74.  
Alex. Gilruth  
Fleming.

Held that the charges of theft and embezzlement were both bad for want of specification, and that the charge of theft was also irrelevant, as the possession set forth was lawful possession, with merely a liability to account.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

The *modus* of a charge of theft, or alternatively of embezzlement, was libelled as consisting of the following facts, viz.:—That the panel, who was unable to pay his debts, and had granted a trust deed for behoof of his creditors in 1879, which was superseded by sequestration of his estates in 1883, promoted a banking company with a capital of £10,000,000, which was registered under the Companies Acts in January in 1881; that he then, without finding caution for his intromissions and the faithful discharge of his office, in terms of the articles of association, entered upon office and acted as general manager of the company until its liquidation in July 1884. Further, that he in the course of carrying on this business got into his custody and control 'all the moneys of the said company, being the capital of the said company in so far as paid up, and the moneys lodged with the said company by depositors,' amounting in all to £5000. His duty to apply that money for the best interest and security of the said company, and in no event to appropriate it to his own use, was set forth. The first charge concluded thus—You, the panel, 'taking advantage of your position as general manager foresaid, and having no directors of the said company duly appointed to control or supervise, you did at various times between' 19th January 1882 and 1st September 1884, at the premises of the company, steal the sum of £2736. The alternate charge proceeded on the same narrative, and was that you, the panel, did, 'contrary to your duty and in breach of your trust as general manager foresaid, and out of the ordinary course of banking business, take to yourself out of the moneys in your custody and control as general manager foresaid, unsecured and improper overdrafts on your accounts current with the said company, numbered respectively 1, 4, 5, and 7, the said overdrafts amounting together' to the sum of £2736, and did thus embezzle that sum.

Held that there was no relevant charge either of theft or embezzlement.

Held, upon an objection to a charge of breach of trust and embezzlement, that the charge sufficiently specified the person to whom the panel was bound to account; also that the *locus* of appropri-

tion contained a sufficient specification of the place where the panel received the money alleged to have been embezzled. Held in a trial for Breach of Trust and Embezzlement, that it was incompetent to adduce, in support of the charge, evidence of what the panel deponed to in his deposition in a sequestration of the estate, a portion of which he was charged with having embezzled.

1885.

No. 74.  
Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

ALEXANDER GILRUTH FLEMING, now or lately banker in Dundee, was charged at the Circuit Court held at Dundee on 16th January 1885, with the crimes of theft and breach of trust and embezzlement. Objections were taken to the relevancy of the indictment, and after hearing argument, Lord Adam certified the case to the High Court. The indictment charged these crimes as having been committed.

IN SO FAR AS (1.), a sum of £413, 5s. 3d. or thereby having been, on or about 30th January 1880, at the credit of an account current with the North of Scotland Banking Company, at the branch office in Dundee, kept in your name for behoof of the representatives of the late William Ireland, hardware merchant and jeweller, Dundee, the said sum being the balance or residue, or part of the balance or residue, of the estate of the said William Ireland, which was held by you in the said account on behalf of Mrs Isabella Rogers Butchart or Ireland, now or lately residing in Windsor Street, Dundee, the executrix of the said estate, or person acting as factor, and for the purpose of being divided among the creditors of the said estate, which was insolvent; and (after certain legal proceedings raised by the said executrix and you for recovery of the said sum from the said North of Scotland Banking Company were in dependence), the said estate having been sequestrated under the Bankruptcy Statutes on 24th March 1880, and James Davie, now or lately superintendent of the Public Washing Houses, Dundee, and residing in or near Cowgate, Dundee, having been confirmed trustee thereon on or about 17th December 1880; and the said sum of £413, 5s. 3d., with the interest accruing thereon from the said 30th January 1880, having, as the result of the said proceedings raised by the said executrix and you, been recovered from the said North of Scotland Banking Company, through Robert Menzies, solicitor before the Supreme Courts of Scotland, burgh, the agent for the said executrix and you in the said proceedings, and you having received from the said Robert Menzies said sum so recovered, under certain deductions, in two parts

both made by him to you in or near his office at North St David Street, Edinburgh, the first being a payment of £5 in cash, made by him to you on or about 4th January 1881, and the second being a payment of £377, 3s. 10d., made by him to you on or about 6th January 1881, by cheque on the Commercial Bank of Scotland, George Street, Edinburgh, which you on the said day drew in cash, the said two payments amounting together to the sum of £382, 3s. 10d.; and you having received the said moneys last mentioned as factor and on behalf of the said executrix, and under the trust and duty that you should forthwith hand over the same to the said trustee on the sequestrated estate of the said William Ireland, for the purpose of the same being divided among the creditors of the said estate, and that you should in no event appropriate the same to your own uses and purposes, you did take the said moneys last mentioned to Dundee, and you the said Alexander Gilruth Fleming did, on the said 6th day of January 1881, or on some other of the days of that month, or of the month of February immediately following, or between the said 6th day of January 1881 and the 30th day of June 1882, both inclusive, the time more particularly being to the prosecutor unknown, within or near the office or other premises in Commercial Street, Dundee, then occupied by you or by the Scottish Banking Company (Limited), or elsewhere in Dundee to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take the said sum of £382, 3s. 10d. or thereby, or part thereof: OR OTHERWISE, you did fail to hand over the said sum for the purpose of the same being divided among the creditors of the said estate as aforesaid, or to account to the said executrix or to the said trustee therefor, and you the said Alexander Gilruth Fleming did, time and place above libelled, wickedly and feloniously, and contrary to your duty, and in breach of the trust incumbent on you as aforesaid, embezzle and appropriate to your own uses and purposes the said sum of £382, 3s. 10d. or thereby, or part thereof, the said sum of money so stolen or embezzled and appropriated by you as above libelled being the property or in the lawful possession of the said executrix, or of the said trustee in the sequestration of the said William Ireland's estate, and consisting of bank or banker's notes, and of gold, silver, and copper or bronze money, the particular amounts and description of the said notes and coin being to the prosecutor unknown: LIKEAS (2.), Robert Yeaman, formerly residing at The Lea, Corstorphine, near Edinburgh, and now or lately residing at Craiglockhart Hydropathic Institution, near Edinburgh, having under agreement between the Heritable Securities and Mortgage Investment Association (Limited), and him, dated 15th and 16th March 1882, been appointed and acted as factor for the said association during the period from 15th

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

1885. March 1882 to 12th July 1883, for certain heritable properties in  
 No. 74. Dundee, with power to him to uplift the rents and feu-duties  
 Alex. Gilruth thereof, to let the same to tenants, and generally to manage the  
 Fleming. same, and to appoint a sub-factor on his own responsibility, and  
 High Court, for whom he should be liable; and the said Robert Yeaman  
 Feb. 21 and having, on or about 15th March 1882, appointed you the said  
 March 23. Alexander Gilruth Fleming to be his sub-factor accordingly, for  
 Theft, the said properties, with power to you to appoint, as you did,  
 Breach of James Kinnes, then residing in Dundee, and now or lately residing  
 Trust and in or near Caledonia Road, Glasgow, as under factor, and you  
 Embezzle- having acted as said sub-factor during the said period from 15th  
 ment. March 1882 to 12th July 1883, and having at various dates in  
 the course of the said period, received from the said James Kinnes,  
 and from Charles M'Master, hotel keeper, Commercial Street,  
 Dundee; James Grant Speed, wine and spirit merchant, Dundee;  
 Westwood, Sons, and Millar, bellhangers and blind manufacturers,  
 Dundee; and Matthewson and Son, tea merchants, Seagate,  
 Dundee, tenants of said properties, sums of money amounting to  
 £864, 10s. 5d., and various other sums, being the rents and feu-  
 duties of the said heritable properties accruing and paid during  
 the said period; and it being your duty, and according to your  
 trust and instructions from the said Robert Yeaman, to pay to the  
 said Robert Yeaman the said rents and feu-duties regularly, as  
 they were received by you, and that by paying the said rents and  
 feu-duties to his credit in his account with the Royal Bank of  
 Scotland at their office in Murraygate, Dundee, or by remitting or  
 paying the same to him direct and personally, and in no event to  
 appropriate the said rents and feu-duties, or any part thereof to  
 your own uses and purposes, you the said Alexander Gilruth  
 Fleming did, on several or one or more occasions during the period  
 from 15th March 1882 to 27th August 1883 inclusive, the time  
 or times more particularly being to the prosecutor unknown, within  
 or near the office or premises in Commercial Street, Dundee, then  
 occupied by you, or by the Scottish Banking Company (Limited),  
 or elsewhere in Dundee to the prosecutor unknown, wickedly and  
 feloniously, steal and theftuously away take the said sum of £864,  
 10s. 5d. or thereby, being rents and feu-duties to the said amount,  
 received by you, as sub-factor aforesaid, from the said properties  
 as aforesaid: OR OTHERWISE, you did fail to pay the said sum to  
 the said Robert Yeaman, or to account to him therefor, and you  
 the said Alexander Gilruth Fleming did, time and place last above  
 libelled, wickedly and feloniously, and contrary to your duty and  
 instructions, and in breach of the trust reposed in you as aforesaid,  
 embezzle and appropriate to your own uses and purposes the said  
 sum of £864, 10s. 5d. or thereby, being rents and feu-duties to



the said amount received by you as sub-factor foresaid from the said properties as aforesaid, the said sum of money so stolen or embezzled and appropriated by you as above libelled being the property or in the lawful possession of the said Robert Yeaman, or of the said Association, and consisting of bank or banker's notes, and of gold, silver, and copper or bronze money, the particular amount and description of the said notes and coin being to the prosecutor unknown: LIKEAS (3.), you the said Alexander Gilruth Fleming having, on or about 27th May 1879, you being then unable to pay your debts, granted a trust disposition and assignation of all your estates, heritable and moveable, then pertaining and belonging to you, or which should pertain and belong to you during the subsistence of the trust, in favour of Rennald Ferguson Hunter, solicitor, Dundee, as trustee for behoof of your creditors, and your insolvency having, as you well knew, continued from the said date, and the said trust having subsisted until the same was superseded by sequestration of your estates under the Bankruptcy Statutes, on or about 1st October 1883, and you the said Alexander Gilruth Fleming having projected and promoted a company, constituted under memorandum and articles of association framed by you, and called the Scottish Banking Company (Limited), which was incorporated and registered under the Companies Acts 1862 to 1880 on or about 12th January 1881, with a nominal capital of £10,000,000 sterling, divided into 500,000 shares of £20 sterling each, and having its head office in Commercial Street, Dundee, and branch offices in Lochee, and in George Street, Edinburgh, and which company is now insolvent, and in liquidation by order for winding up by the Court, under the said Companies Acts, dated on or about 18th July 1884; and you the said Alexander Gilruth Fleming having, as general manager of the said company, appointed under the articles of association of the said company, and without finding any caution or security for your intromissions and the faithful discharge of your said office in terms of the said articles, commenced the business of the said company on or about 10th March 1881, and having carried on the same until the date of the said liquidation order, and thereafter, by interposing an appeal to the House of Lords against the said order, until on or about 1st September 1884; and you the said Alexander Gilruth Fleming, in the course of carrying on the business of the said company, having got into your custody and control, at the head office of the said company, as general manager foresaid, all the moneys of the said company, being the capital of the said company, in so far as paid up, and the moneys lodged with the said company by depositors or persons having current accounts or operative deposit accounts with the said company, amounting all

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzlement.



1885. the said moneys to the sum of £5000 or thereby; and it having  
 No. 74. been your duty, and according to your trust as general manager  
 Alex. Gilruth foresaid, to hold and apply the said moneys only in the ordinary  
 Fleming. course of banking business for the best interest and security of the  
 High Court, said company, and of the said depositors therewith, and in no event  
 Feb. 21 and to appropriate the said moneys to your own uses and purposes, you  
 March 23. the said Alexander Gilruth Fleming, taking advantage of your said  
 position as general manager foresaid, and having no directors of the  
 Theft, said Company duly appointed to control or supervise you, did, at  
 Breach of various times during the period between the 19th day of January  
 Trust and 1882 and 1st September 1884, both dates inclusive, the times  
 Embezzle- more particularly being to the prosecutor unknown, within the  
 ment. office or other premises of the said company in Commercial Street,  
 Dundee, or elsewhere in Dundee to the prosecutor unknown,  
 wickedly and feloniously, steal and theftuously away take out of  
 the moneys in your custody and control as general manager foresaid,  
 the sum of £2736, 11s. 8d. sterling or thereby, or part thereof;  
 OR OTHERWISE, you the said Alexander Gilruth Fleming, taking  
 advantage of your position as general manager foresaid, and  
 having no directors of the said company duly appointed to control  
 or supervise you, did, times and place last above libelled, wickedly and  
 feloniously, and contrary to your duty, and in breach of your trust as  
 general manager foresaid, and out of the ordinary course of banking  
 business, take to yourself, out of the moneys in your custody and  
 control as general manager foresaid, unsecured and improper over-  
 drafts on your accounts current with the said company, numbered,  
 respectively, 1, 4, 5, and 7, the said overdrafts amounting together,  
 after deducting a sum of £217, 8s. 10d. at your credit on other  
 accounts, to the said sum of £2736, 11s. 8d., and you did thus,  
 then, and there, wickedly and feloniously, and contrary to your  
 duty, and in breach of your trust as general manager foresaid,  
 embezzle and appropriate to your own uses and purposes, the said  
 sum of £2736, 11s. 8d. or thereby, or part thereof, the said sum of  
 money so stolen or embezzled and appropriated by you as above  
 libelled being the property or in the lawful possession of the said  
 company, and consisting of bank or banker's notes, and of gold,  
 silver, and copper or bronze money, the particular amounts and  
 description of the said notes and coin, and the amount so stolen or  
 embezzled and appropriated by you at any one time being to the  
 prosecutor unknown: And you the said Alexander Gilruth Fleming  
 having been apprehended, &c.

HAY and RHIND for the panel objected to the relevancy.—The indictment contains three charges of theft, with an alternative charge to each of breach of trust and

embezzlement. We object to the relevancy of all these charges.

The first charge sets out with a narrative [reads]. So far as intelligible, this does not contain any relevant averment of duty. It is said that the panel acted as factor for the executrix upon the estate of the late Wm. Ireland, which estate was insolvent, and was afterwards, viz., on 24th March 1880, sequestrated. That at 30th January in that year there was at his credit in an account current kept by him as factor with a certain bank, a sum amounting to £413 odds for the purpose of being divided among the creditors of said executry estate which was then insolvent, and that of this amount, as the result of certain legal proceedings raised by him as factor along with the executrix against the said bank, he (the panel) recovered and received payment of the sum of £382 odds on 4th and 6th January 1881 from the law agent who conducted the proceedings. The indictment then proceeds, 'And you having received the said moneys last mentioned *as factor*, and on behalf of the said executrix, and under the trust and duty that you should forthwith hand over the same to the said trustee on the sequestrated estate of the said Wm. Ireland, for the purpose of the same being divided among the creditors of the said estate, did' take the money to Dundee on 6th January 1881 (the day on which it was received), and on that day, or on some other day within a period of eighteen months, steal it. We contend that there is not there set forth a sufficient averment of duty. It is not sufficient to say simply that Ireland's estate was insolvent on January 1880, and was subsequently, viz., in March following, sequestrated. The charge ought to have specified wherein the duty of this factor for the executrix lay to pay over the amount libelled to the trustee on Ireland's sequestrated estate. His duty as factor was to pay the executry debts, and to account to the executrix in the first place. But it is not said in the indictment that the executry debts had been

1885.

---

 No. 74.  
 Alex. Gilruth  
 Fleming.

---

 High Court,  
 Feb. 21 and  
 March 23.

---

 Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

satisfied, and it is not averred that he did not pay over the amount to the executrix. It is averred, however, that it was as factor that he received the amount, and that being so, we contend that the charge of theft is, in the circumstances of the case, incompetent. A factor is in the legal possession of the funds committed to him or recovered by him. He has power to pay out of these, and to transact in regard to them. He is not their mere custodier, and as such bound to hand over the *ipsa corpora* of them, but to account only. Although, therefore, he may be said to be guilty of breach of trust and embezzlement, if he appropriates them, he cannot be legally charged with theft. Hume, vol. ii., p. 190. Further, even if a charge of theft were competent, as the panel was in the legal possession of the sum libelled, he was entitled to have it averred when, where, and by what means this legal became converted into a felonious possession, otherwise he will be unable to defend himself. *Angus M'Kinnon*, High Court, May 25th, 1863, Irv., vol. iv., p. 398. In this case the possession arose from the article libelled being found.

LORD YOUNG.—You are in a much stronger position for your argument than that, for the finder never has the property with the owner's consent.

RHIND and HAY for the panel.—That is so. Our contention is that the obligation here was merely to account, and the case of *Walter Duncan*, Perth, Sep. 26th, 1849, J. Shaw, p. 270, cited for the Crown, is not an authority against us. The objection was not there taken. Further, there is too great latitude taken in libelling the time. It is said that the sum libelled was received by the panel as factor on the 6th, on which day he took it to Dundee and there stole it, and a latitude of nearly eighteen months is taken. That is just a simple act of theft of a slump sum, not a series of thefts of various sums. It is not therefore a case in which, on account of the peculiarity of the circumstances,

the prosecutor is entitled to a greater than the ordinary latitude of three months ; and this objection applies with equal force to the first charge of embezzlement in which a similar latitude is taken. It is further objected to the alternative charge of embezzlement, (1) that no duty to account is stated, and (2) it is not said that the panel had been called upon so to account.

But these objections are also equally applicable to all the other charges. The objection to the competency of the charge of theft applies equally to the circumstances set forth in the second charge. It is said that the panel having, as sub-factor upon certain properties specified, received a sum of £864, and various other sums, he failed to pay them to the factor upon these properties. There is no room there either, we contend, for a charge of theft. As sub-factor he was invested with certain powers of making payments, and was in the legal possession of the sums recovered by him and bound only to account. This second charge, in addition, is wanting also in specification. Though rents might have been due, yet a tenant might satisfy the rent without a money payment to the factor. It ought to have been specified, by being either set forth in the charge itself, or by reference to an inventory, who the persons were from whom the panel received the moneys libelled, the amounts, and the time when these were received from each, and the amounts which the prosecutor alleges the panel stole from each sum. *William Scott*, Glasgow, May 8th, 1879, *Couper*, vol. iv., p. 227. The objection is the same as was sustained in *Scott's* case, with this addition, that it being part of the duty of a house-factor to pay away as well as to receive sums, that makes the necessity for specification all the greater. The amount libelled, viz., £864, is here also charged as having been stolen on several or one or more occasions during the period from 15th March 1882 to 27th August 1883—a period of nearly eighteen months. The latitude taken here is too great — the money was stolen in slump or in

1885.

---

 No. 74.  
 Alex. Gilruth  
 Fleming.

---

 High Court,  
 Feb. 21 and  
 March 23.

---

 Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.

1885.  
No. 74.  
Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

different parcels. If stolen in slump, a latitude of eighteen months is unjustifiable ; and if stolen in parcels, then the Crown must narrate when and in what amounts the money was taken. Besides, it being difficult to see how a single sum could be stolen on 'several or one or more occasions,' the latitude taken is, we contend, too great and not warranted by the narration of any such circumstances as can justify it.

The third is a charge of stealing the sum of £2736, 11s. 8d. It is said that the panel, having been insolvent between 27th May 1879 and 1st October 1883, when his estates were sequestrated, projected a bank, which was incorporated and registered under the Joint Stock Companies Acts, on 12th January 1881, and was carried on for three years and a half, but is now in liquidation, under a winding up order, dated 18th July 1884. That, as General Manager, he got into his custody or control all the capital of the bank, and the money lodged by depositors, or upon current or operative deposit accounts, amounting in all to the sum of £5000 ; and that, taking advantage of his position, 'and having no directors of the said company duly appointed to control or supervise' him, he 'at various times during the period between the 19th day of January 1882 and 1st September 1884'—two years and eight months—stole the sum of £2736 ; or otherwise, that during said period he, in breach of his trust as general manager, and out of the ordinary course of banking business, took to himself out of the moneys in his custody, 'unsecured and improper overdrafts on his accounts current, amounting to £2736, and did thus embezzle said amount the property of the bank.' That is neither a relevant nor sufficient averment of either theft or embezzlement. It does not appear whether the panel stole the amount out of the capital of the bank, from the shareholders, or out of the deposits, from the depositors ; nor is the mode of the theft specified. It is not said that he falsified the books, or how he stole the amount. It is said that there

were no directors duly appointed ; but the panel was entitled to have it averred whether there were no directors, and, if there were any, how they were not duly appointed. Further, if he was manager, and the funds were placed in his hands, whether he was controlled or supervised or not, he was in possession of the funds, with the powers and duties of a manager ; and as such he was bound to account only, and could not steal. He occupied a different position from the panel Robert Smith, in the case of *Robert Smith and James Wishart*, High Court, May 18, 1842, Broun, vol. i., p. 342, cited for the Crown. Smith was a bank teller, and had power only to receive and pay the moneys belonging to the bank for a specific purpose. Being manager, the panel was entitled to employ and transact with the funds, and to pay expenses, including his own salary. He was in possession of the funds under an obligation to account : but a teller has the custody only of the funds committed upon a limited trust and is bound to account *in forma specifica*. Then the latitude taken in libelling the time—two years and eight months—is not justified by the nature of the case or by the narration of any circumstances. When a prosecutor does not specify time and place, he is bound to give good reason for not so doing. And if it is said the panel was custodier of the funds and embezzled them, the prosecutor ought, we contend, to have specified from whom he embezzled the amount and how. It is not sufficient to say that he took to himself unsecured and improper overdrafts on his accounts current with the bank, and did *thus, then*,—that is, during the two years and eight months,—and there, embezzle said sum. That is just saying that a bank manager who overdraws his account current commits breach of trust and embezzlement. The prosecutor must know when these overdrafts took place and their amounts, and he was bound to have specified them. *William Scott*, Glasgow, May 8, 1879, Couper, vol. iv., p. 227. It ought also to

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.



## CASES BEFORE THE HIGH COURT

been averred that it was the panel's duty to prevent overdrafts or to give security, as was set forth in the indictment against the City of Glasgow Bank directors.

R. V. CAMPBELL, A.-D.—The objections are partly to the particular name which should be used to designate the offences charged, and in some degree to the alleged want of notice or specification. The later authorities since Baron Hume's work, have greatly extended the definition of theft, and in each of the charges bearing that name it will be seen, upon a careful perusal of the indictment, it is averred that there was a limited possession or custody subject to a strict and limited duty. The panel was, as regards these charges, in an exceptional position of administration. In the first charge it is expressly averred that the panel's whole duty was that of a messenger, to hand over the money to the trustee. In the second charge his duty as averred as they were received, without deduction of charges, was to hand over the *ipsa corpora* of the rents regularly being without directors. The panel was an insolvent man, appointed general manager by articles of association drawn up by himself, and who had found security, as provided even in these articles. In the circumstances his duty was, as averred, a limited special one. Theft is accordingly the right name for three charges, as it was in the case of Wormal Smith, and Wishart, quoted. And as to embezzlement, the principle contended for is, that a panel is to be drawn between words of charge, particularly, and the averments which fall to be called, and the averments which fall to be followed by the prosecution. There is no order to give fair notice of the line of evidence followed by the prosecution. There is no the terms of any of the charges; the objection



case resolves itself into one of want of full particulars in the averments introductory to or explanatory of the charges; as to which the general rule is simply that there shall be fair notice. *Elder v. Morrison*, High Court, 9th Nov. 1881, Couper, vol. iv., p. 530. *Henry Creighton*, Inveraray, 3rd May 1876, Couper, vol. iii., p. 254.

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

In the narrative of the first charge there is, in the first place, set forth a clear averment of duty. It is set forth in what capacity and under what trust the funds were received. We say that the estate of William Ireland was insolvent, and was subsequently sequestrated, and that the panel recovered and received the sum libelled as factor of the executrix, under the trust and duty of handing over the money he received to the trustee in bankruptcy, that it might be divided among the creditors; and that the panel had no right, in any event, to any portion of the moneys received by him other than a right of custody for that particular purpose.

LORD YOUNG.—Can the fact of whether a thing is theft or not depend on the result of an accounting.

R. V. CAMPBELL, A.-D.—The case of *Joseph D. Wormald*, High Court, 27th March 1876, Couper, vol. iii., p. 246, says Yes. Wormald was liable to account, and the charge of theft against him was held perfectly relevant; and the same principle was involved in the decision in the case of the *City of Glasgow Bank Directors*, High Court, 21st June 1879, Couper, vol. iv., p. 161. The charge of theft has, in more recent practice, come in a great measure to supersede the charge of breach of trust and embezzlement; and even since the decision in Wormald's case, that charge has been placed first, in all libels where it is charged along with breach of trust and embezzlement. The panel suffers no disadvantage from this. Embezzlement is just theft under special circumstances; and although that is still regarded, as in most cases, the proper designation of the crime of the person who appropriates money already in his legal possession,

and under his entire control. It is in vain to say that there can be no theft in any case where the possession is lawful to commence with. For that would be going against a long series of decisions since *Sumner's* time. We contend that a man who, in the course of his employment in a well-known office such as that of inspector of poor, treasurer of a friendly society, bank teller or commercial traveller the duties of which are quite ascertained, has committed to him in his capacity as such, the custody or possession of moneys for the purposes of his office, and instead of so applying them appropriates them to his own uses and purposes, commits the crime of theft: although possibly also he may be liable to an action of accounting. He is in reality in no different position from that of a porter who, being entrusted with a pound note to get changed into pence with it; except this, that in all such cases—the present being one of them—there is of necessity, from the circumstances, a period of time, more or less extended, involved in its commission, and it is a crime which, in its nature, is an *occuli* one. For that reason it is impossible in such cases to say when the *malus animus* necessary to constitute theft. That is a matter in the panel's mind, and cannot be more definitely labelled than by saying, that a certain sum of definite amount was appropriated, between certain dates, more or less distantly apart, according to circumstances, 'the time more particularly being to the prosecutor unknown,' without specifying the persons from whom the moneys were received, or their amounts, or when and where they were received, nor the amounts that were taken from each sum. In such cases the prosecutor cannot be called on to give more information than he has, or can with reasonable enquiry obtain. *Robert Smith and James Wishart*, High Court, May 18, 1842, Broun, vol. i., pp. 135 and 342; *John Lawrence*, High Court, January 15, 1872, Couper, vol. ii., p. 168; *Walter Duncan*, Perth, September 26,

1849, J. Shaw, p. 270 ; *John Rae*, High Court, 16th May 1854, Irv., vol. i., p. 472 ; *George Gibb*, Glasgow, May 3, 1871, Couper, vol. ii., p. 35 ; *William Reid and Thomas Gentles*, Stirling, 23rd and 24th September 1857, Irv., vol. ii., p. 704. The case of *William Scott*, Glasgow, 8th May 1879, Couper, vol. iv., p. 227, cited against us, is quite distinguishable from the present case. It does not fall within the principle contended for in libelling such cases. Scott's firm were the payees of the bills which he was employed by the bank to discount, not as bill-broker simply, but under a special arrangement with the bank. He was not therefore acting solely in a well-known fixed capacity. The case was a special and exceptional one, and was in no way intended to reverse the original general rule, nor to introduce a new rule which it is impossible to comply with in indicting such officials, and which, if fulfilled, would give no factor, as in the present case, any information really necessary for his defence. The specification in the second charge is greater than is required by the general rule, and is as much as the information in hand enabled the Crown to give. And that is all that is necessary. The third charge is somewhat special in its circumstances, and we have therefore prefaced it also with a narrative ; and in judging of the relevancy the circumstances narrated must be taken into account. It is unnecessary for the prosecutor in a charge of theft to specify the *modus* : and as regards the time, the nature and circumstances of the case justify the latitude taken. The case of the City of Glasgow Bank Directors already quoted is directly in point. If it amounted to theft for those directors to obtain money by means of overdrafts upon their accounts while they themselves were solvent, much more must the overdrawing of his account by the panel, an insolvent bankrupt, entirely uncontrolled, be held to amount to the crime of theft. Keeping in view also the circumstances set forth in the narrative, the charge

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

1885.  
 No. 74.  
 Alex. Gilruth  
 Fleming.

High Court,  
 Feb. 21 and  
 March 23.

Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.

of breach of trust and embezzlement is also relevant. There is no such averment in the indictment as that a bank manager who overdraws his accounts without security commits breach of trust and embezzlement. Regard must be had to the averred uncontrolled position in which the panel stood, and to the fact of his insolvency and undischarged bankruptcy, which clearly explain and define what is meant by the expression 'improper overdrafts,' any advance taken by panel for his own use, being in his then condition, plainly unsecured, was an improper overdraft.

At advising—

LORD CRAIGHILL.—There are three separate charges of theft in this indictment, with alternative charges of breach of trust and embezzlement. The relevancy of all has been objected to on the part of the prisoner; but on the one hand the objections to the charges of embezzlement were not so strongly urged as those to the charges of theft, and on the other hand the relevancy of these last were not so earnestly maintained as the relevancy of the charges of theft. A decision upon all was left to the Court, and therefore on all judgment has now to be pronounced. I take up the several charges in their order, the relevancy of which we have separately to consider.

The first charge is theft, the *species facti* of which are that two payments, amounting together to the sum of £382, 3s. 10d., having been made to the prisoner, and he having received those moneys as factor for and on behalf of the executrix of Mr Ireland, and on the trust and for the purpose libelled, and that he should in no event appropriate the same to his own uses and purposes, he did on one or other of the dates, and at one or other of the places libelled, wickedly and feloniously, steal and theftuously away take the same, being the property or in the lawful possession of the said executrix or of the said trustee, and consisting of bank or bankers' notes, and of gold, silver, and copper money, the par-

particular amounts of each being to the prosecutor unknown. To say nothing of other objections, this as a charge of theft seems to me to be irrelevant, because the money said to have been stolen was at the time libelled in the possession of the prisoner as factor for the executrix of Mr Ireland, having, as the indictment bears, been received by him in that character. A factor is not a servant who receives money for the sake of custody ; he is one doing business for another for hire. The moneys he receives are in his possession, and these, though they may be embezzled, cannot be stolen, because the circumstances and the power over that which he receives prevent such taking as is necessary for theft. This, I think, is well explained by Lord Young in the case of *Scott, Couper*, vol. iv., p. 234, where he says—‘The distinction between theft and embezzlement consists in this—that in theft the property stolen is by the thief feloniously taken out of the possession of the owner or other lawful possessor, whereas in embezzlement the property which is the subject of it is already in the embezzler’s own possession, having been lawfully received by him on account of the owner (into whose possession it has never passed), to whom he stands in a relation of trust. The chief, and indeed essential, feature of either crime is the felonious appropriation or conversion by the accused of the property of another, and this feature is common to both. The thief feloniously seizes property in another’s possession ; the embezzler feloniously violates the trust and confidence on which he received the property on account of another. Each unlawfully appropriates and converts to his own use property not his own.’ Many decisions were quoted, some to one effect and some to another, but none appears to me to be inconsistent with the exposition of the law in the passage which has been quoted. That most relied on by the counsel for the prosecution was the case of *Wormald*, 27th March 1876, *Couper*, vol. iii., p. 246, the rubric of which

1885.

---

 No. 74.  
 Alex. Gilruth  
 Fleming.

---

 High Court,  
 Feb. 21 and  
 March 23.

---

 Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.

1885. bears that in an indictment charging alternatively theft and breach of trust, it was stated in that part of the minor which related to the charge of theft, that the panel, being a law-agent, and having been entrusted by a client to uplift from a bank a sum belonging to him for the special purpose of investing the same in heritable security, he (the panel) uplifted and did then theftously away take the said sum, and it was held that this was a relevant charge of theft. Here, however, the material fact that the money had been uplifted by Wormald before the time at which (no investment having been procured) he was authorised to lift it, omitted, though that in reality, as explained by the Lord Justice-General, was the ground of judgment. The Lord Justice-General's words are these (p. 249) — 'Assuming the statement in the minor proposition is as far as regards the charge of theft, the whole amounts to this, that Mr Donaldson had money in the bank of the amount of £600; that he was advised by Mr Wormald, as his law-agent, that it would be desirable to have that money invested in heritable security, and that in consequence of that he granted the necessary authority to Mr Wormald, as his law-agent, to invest the money in heritable security for him, and that in order to enable Mr Wormald to carry out his instructions Mr Donaldson endorsed in his favour certain deposit-receipts which he held for the money. Now, the duty of a law-agent in these circumstances clearly was to seek for an heritable security, and, when he had found one, then to uplift the money from the bank and pay it to the borrower. But he certainly had no authority in the circumstances disclosed in the indictment to uplift that money till he had obtained an heritable security. Therefore when he uplifted the money without having obtained the heritable security, he did an act which was not authorised by Mr Donaldson at all, and the statement is that in such circumstances he uplifted the money on the 8th Sep-

No. 74.  
Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

tember 1871, and on that day stole the money. Now, in these circumstances I am driven to the conclusion that it is a relevant charge of theft.' There was thus obviously a felonious taking, and a clear ground upon which a charge of theft could be relevantly libelled. The present case is thus distinguished from that of *Wormald*, because the money came lawfully into the prisoner's possession, and there is thus excluded a basis for the felonious taking which the circumstances afforded in that case. But this is not all. There is on the very question before us a clear and precise authority furnished by a passage in the work of Baron Hume, vol. i., page 60, where he explains the law of this case in the following words:—'Under the same rule falls the case of a factor who runs off with his employer's rents, after receiving them from the tenants. . . . This, though criminal, is, however, a fraud only, or breach of trust, and not an act of theft.' Cases are referred to by which this doctrine is supported; and were there nothing else to refer to as matter of authority, its soundness never having been gainsaid, it would be sufficient, as I think, to support the opinion which I have expressed. The same view of the law is presented by Burnett, page 111; by Allison in his 'Principles,' page 356; and by Professor More in his 'Lectures on the Law of Scotland,' vol. ii., page 388; as well as by our latest writer on criminal law, Mr Macdonald. There is thus both principle and a body of authority in favour of the view of the law which I have adopted. My opinion is that this charge of theft as libelled is irrelevant.

On the alternative charge of embezzlement I merely say, that although it cannot be said to be happily expressed, it is, I think, not irrelevant. In substance it contains all that is essential to, and nothing which is necessarily inconsistent with, embezzlement. Its language is in substance the same as that which is generally used in libelling such a charge, and therefore I

1885.

---

 No. 74.  
 Alex. Gilruth  
 Fleming.

---

 High Court,  
 Feb. 21 and  
 March 23.

---

 Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.



1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

think that the objection stated against it ought to be overruled.

The second charge of theft is similar to the first. The prisoner is there charged with stealing rents received by him as sub-factor to the factor for the owner of the property. The rule for the first charge therefore governs the second, and the same decision must in the case of both be pronounced. But there is another objection to the second charge, which also would be fatal. The indictment bears that the prisoner having received from James Kinnes, and the other persons named, sums amounting to £864, 10s. 5d., and various other sums, being rents or feu-duties of heritable properties accruing and paid during the period libelled, and it being his duty and according to his trust to pay the same to the said Robert Yeaman as they were received, he did at the times and places libelled, wickedly and feloniously, steal and theftuously away take the sum alleged to have been stolen. Here there is no specification of the sums received, or of the feu duties, or of the dates at which, or of the persons from whom those were received, and the relevancy has been objected to also on this ground. This objection as urged was, I think, too broad, but there is enough in it to invalidate the charge here libelled. The rule which should have been followed in the libelling of such a charge as this, is that which was adopted in the case of *Rae*, 16th May 1854, Irv., vol. i., p. 472. There the objection to relevancy for want of specification was repelled; the inventory annexed to the indictment set forth the names of the persons from whom it was alleged the person accused had received the money. Moreover, the particular sums were mentioned, and these things being so, the Court held that this was sufficient information, and that to go further would be very embarrassing, as tending to load the indictment with matters which the prosecutor was not bound to establish. The Court did not think that the particular days or

dates of the several payments must be set forth. Had the information which was given in Rae's case been given here, though it is not all which was held to be necessary in the case of Scott, I should have supported the relevancy of the charge, the *species facti* here coming nearer to the case of Rae than to the case of Scott. But unfortunately there is no specification of individual sums or of the persons from whom these were severally received, and for this reason also I think the objection to the relevancy of the second charge of theft must be sustained. The alternative charge of embezzlement must, for want of specification, likewise be held irrelevant. But for this defect of specification I should have repelled the objection, as the libelling, though longer than necessary, in all matters material appears to be consistent with the usual style.

I have found more difficulty in forming an opinion on the third than on the two previous charges. On the very best that could be said for it, the indictment, so far as the third charge is concerned, is most unhappily expressed. At one time I was disposed to think that we might take the third charge of theft as substantially setting forth that the prisoner, being the manager of a bank, and under the control and supervision of no Directors or other persons by whom his misdoings could be exposed, and being the custodier of the money in the bank, availed himself of the opportunity of taking from the coffers of the bank money which was there, the property and in the possession of the bank. But though I was disposed to think it was just possible so to read the indictment, yet in the end I have come to the conclusion that it is not fair and proper that an indictment should be sustained which is susceptible of two different meanings. A more unhappily framed charge than this last charge of theft, and the alternative of embezzlement, could scarcely have been devised. It is overloaded with things that are not necessary, the introduction of which not only distracts the attention, but points to an entirely

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

... I was ... I think we ...

... which ... is that ...

... necessary ... of ... I may ... matter— ... has ... certain ... warrant ... necessary ... taking ... stole ... money, gold ... clearly of ... change is ... of the ... opportunity ... without ... latitude ... say that within ... the latitude ... 1st September ... himself of ... money in the bank ... There would be ... But the indictment begins

by stating that having on or about 27th May 1879 been unable to pay his debts, he granted a trust disposition and assignation, and having afterwards been sequestrated he got up a bank with a capital of ten millions, and instituted himself as manager, and carried on the business of the bank from 10th March 1881 to 1st September 1884, and got certain sums paid to him as subscriptions by shareholders. We are not told in the indictment, but it was explained in the argument, that these sums amounted to a trifle over £400. Then the indictment goes on to say that during that period of years he received from depositors certain sums of money, which, together with the subscriptions, amounted to over £5000, and that, beginning in 1882 and going on to 1884, he stole the money, apparently by overdrawing an account which he had opened. That is not the way of stating a charge of that kind relevantly and clearly, and I entirely concur in the observations of Lord Craighill, that in this matter, which was referred to the Court by Lord Adam on circuit, we could not with any propriety sanction this charge as it is presented to us. If the Prosecutor should find it necessary to go on with this matter there will be no difficulty in stating a charge in the usual way, and in accordance with the views that have been expressed. The judgment we now pronounce is that which I have already sufficiently indicated—to sustain the relevancy of the first charge of the libel as a charge of breach of trust and embezzlement, and with respect to all the other charges find the libel irrelevant.

The ADVOCATE-DEPUTE explained that he was not in a position to go on with the trial in the meantime, and that the usual practice in such cases of certification, when neither witnesses nor jury were present, was to desert the trial *pro loco et tempore*, with the view of bringing the prisoner to trial subsequently. He accordingly moved that that be done, and said that with the consent of both parties the prisoner's present bail bond

1885.

---

 No. 74.  
 Alex. Gilruth  
 Fleming.

---

 High Court,  
 Feb. 21 and  
 March 23.

---

 Theft,  
 Breach of  
 Trust and  
 Embezzle-  
 ment.

1885. of £100 would hold until a fresh indictment was brought against him.

No. 74.  
Alex. Gilruth  
Fleming.

The following was the Interlocutor:—

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzlement.

‘*Edinburgh, 21st February 1885.*—Find the first charge relevant so far as regards the charge of breach of trust and embezzlement libelled, in all other respects find the libel irrelevant as laid: but on the motion of the Advocate-Depute desert the diet against the panel *pro loco et tempore.*’

The panel was of new indicted before Lord M'Laren in the High Court on 23rd March 1885, upon a libel charging Breach of Trust and Embezzlement.

IN SO FAR AS (1), you having received from Robert Menzies solicitor before the Supreme Courts of Scotland, Edinburgh, in or near his office at North St David Street, Edinburgh, the sum of £5 paid by him to you in cash on or about 4th January 1881, and the sum of £377, 3s. 10d. paid by him to you on or about 6th January 1881 by cheque on the Commercial Bank of Scotland, George Street, Edinburgh, which you on the said day drew in cash, the said two payments amounting together to the sum of £382, 3s. 10d., and being the balance or residue, or part of the balance or residue, of the estate of the deceased William Ireland, hardware merchant and jeweller, Dundee, which estate had been sequestrated, and on which estate James Davie, now or lately superintendent of the Public Washing Houses, Dundee, and now or lately residing in or near Cowgate, Dundee, was the trustee; and you having received the said sum last mentioned, as factor for the said estate, and under the trust and duty that you should forthwith account for and pay over the same to the said trustee on the sequestrated estate of the said William Ireland, for the purpose of the same being divided among the creditors of the said William Ireland, and that you should in no event appropriate the same to your own uses and purposes, you the said Alexander Gilruth Fleming did fail to pay the said sum of £382, 3s. 10d., or any part thereof, to the said trustee, or to account to the said trustee therefor, and you the said Alexander Gilruth Fleming did on the said 6th day of January 1881, or on some other day or days of that month, or of the month of February immediately following, the time more particularly being to the prosecutor unknown, within or near the office or other premises in Commercial Street, Dundee, then occupied by you, or by the Scottish Banking Company (Limited), or elsewhere in Dundee to the prosecutor unknown, wickedly and feloniously,

and contrary to your duty, and in breach of the trust incumbent on you as aforesaid, embezzle and appropriate to your own uses and purposes the said sum of £382, 3s. 10d. or thereby, or part thereof, the said sum so embezzled and appropriated by you as above libelled being the property of the said trustee, or of the creditors of the said William Ireland : LIKEAS (2), Robert Yeaman, formerly residing at the Lea, Corstorphine, near Edinburgh, and now or lately residing at Craiglockhart Hydropathic Institution, near Edinburgh, having, under agreement between the Heritable Securities and Mortgage Investment Association, Limited, and him, dated 15th and 16th March 1882, been appointed and acted as factor for the said association during the period from 15th March 1882 to 12th July 1883, for certain heritable properties in Dundee, with power to him to uplift the rents and feu-duties thereof, to let the same to tenants, and generally to manage the same, and to appoint a sub-factor on his own responsibility, and for whom he should be liable ; and the said Robert Yeaman having, on or about 15th March 1882, appointed you the said Alexander Gilruth Fleming to be his sub-factor accordingly for the said properties, and you having as sub-factor during the said period from 15th March 1882 to 12th July 1883, received on or about the respective dates specified in the first column of the Schedule hereto annexed and referred to, from the persons and firms respectively whose names and addresses are set forth in the second column of the said Schedule, the respective sums of money set forth in the third column of the said Schedule, amounting in all to the sum of £2599, 15s. 11d. or thereby, being the rents and feu-duties of the said heritable properties accruing and paid during the same period ; and it being your duty and according to your trust from the said Robert Yeaman, to account for and pay to the said Robert Yeaman all the said rents and feu-duties regularly as they were received by you, and in no event to appropriate the said rents and feu-duties, or any part thereof to your own uses and purposes, you the said Alexander Gilruth Fleming did fail to pay to the said Robert Yeaman, or to account to him for the sum of £864, 10s. 5d. or thereby, being part of the said rents and feu-duties received by you as sub-factor foresaid, during the said period as aforesaid, and you the said Alexander Gilruth Fleming did, at various times during the period from 15th March 1882 to 27th August 1883, the times more particularly being to the prosecutor unknown, within or near the office or premises in Commercial Street, Dundee, then occupied by you, or by the Scottish Banking Company (Limited), or elsewhere in Dundee to the prosecutor unknown, wickedly and feloniously, and contrary to your duty and in breach of the trust reposed in you as aforesaid, embezzle and appropriate to your own uses and purposes various sums of money,

1885.

No. 74.

Alex. Gilruth  
Fleming.High Court,  
Feb. 21 and  
March 23.Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

1885. the amount of each sum so embezzled and appropriated being more particularly to the prosecutor unknown, all being part of the said rents and feu-duties received by you as sub-factor aforesaid during the period of your sub-factory aforesaid, and amounting in all to the said sum of £864, 10s. 5d. or thereby, the said sum of money so embezzled and appropriated by you as above libelled being the property of the said Robert Yeaman, or of the said association—  
 No. 74. And you the said Alexander Gilruth Fleming having been apprehended, &c. [There was a Schedule annexed to the indictment, of sums received by the panel as sub-factor for properties in Dundee referred to therein, having three columns. The first containing the dates when sums received; the second, the names and addresses of persons from whom received; and the third, the sums received.]  
 Alex. Gilruth Fleming.  
 High Court, Feb. 21 and March 23.  
 Theft, Breach of Trust and Embezzlement.

RHIND and HAY, for the panel, objected to the revelation—It is stated in the first charge that the panel received the sum of £382 sterling from Menzies, and that he received that money as factor. We object that it is not stated for whom he was acting as factor, and that there is no averment that he did not account to the person who appointed him as such. The indictment leaves it uncertain whether he was acting for Mrs Ireland, or whether he was appointed by the trustee under the Bankruptcy Act on Ireland's estate; or, indeed, whether he was appointed by anyone. In the previous indictment it was stated who appointed him and for whom he was acting. A factor is bound in law to account only to the person appointing him, and consequently it is not specified in the indictment to whom the panel is bound to account, and it cannot therefore be inferred that he had, from the indictment, failed to perform his duty to account.

LORD M'LAREN.—Your argument is, that if he was factor for Ireland, he was not bound to account to the trustee in bankruptcy.

RHIND.—Yes. In the former indictment it was set forth to whom the panel was bound to account. From this indictment we do not know whose factor he was, or what his duty was. We object to the second charge, that it is wanting in specification. While the persons from whom the panel is said to have received the rents



question are mentioned as well as the amounts, and dates on which they were received, there is no specification of the *locus* at which they were received. *William Scott*, 8th May 1879, Couper, vol. iv., p. 227. The place where the panel is said to have received these should have been stated in the schedule. The Crown must prove the place; the panel is entitled to information, in order to prepare his defence.

R. V. CAMPBELL, A.-D.—With reference to the objection to the second charge, the case of *Scott* founded on is a special one. The important element in such a charge is the embezzlement of the money, not the receipt of it. It is plainly averred here where the panel appropriated and embezzled the money, and that is the crime, not what is to be proved. The receipt of it is not a crime. The case of *John Rae*, High Court, 16th May 1854, Irv., vol. i., p. 472, is the form upon which an indictment is framed. The rule is, that the prosecutor must aver that the panel received funds in the course of his office, and that he, out of such funds, embezzled so much. There is more specification here than is strictly required. [Reads Lord Craighill's opinion, *supra*, p. 568.] With reference to the objection to the first charge, it is sufficient, we contend, to aver a trust and duty to account, and it is not necessary to show how that trust arose. Opinion of Lord Young to narrative on p. 1 of previous indictment, *supra*, 574.

LORD M'LAREN.—If it is proved that the factory was in Ireland's executry, that would fall on the sequestration of the estate, and a new appointment by the trustee, or recognition by him would be required. There is an ambiguity as to the factory.

CAMPBELL.—The duty is to account to the trustee on the sequestrated estate, and the expression 'factor for the estate' means, we contend, factor for the estate, either as well as before the sequestration.

LORD M'LAREN.—There are two charges of embezzle-

1885.

No. 74.

Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

1885.  
No. 74.  
Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzle-  
ment.

ment against the prisoner, both of which are objected to ; and it appears, from what has been stated to me, that the relevancy of an indictment against the prisoner has been already considered by the Court of Justiciary. Some of the charges in the previous case were held not to be relevant, and these have been departed from. But the charges in the present indictment were not considered by them to be irrelevant by themselves or in their essence, and the objection now is that we have no objection is, that it is not said who was the employer of the panel. It is necessary in all cases of embezzlement to set out the trust and also the breach of the duty. It is objected that the statement is not sufficient to show who employed him ; but as I read the indictment, there is a sufficient statement that the accused was the factor for the estate of Ireland, which was sequestrated, and on which Davie was appointed trustee. I read that as an allegation of employment by the trustee on the estate. Of course the estate could not appoint any one itself. Of course the estate could not appoint any one itself, some one must appoint ; and I think there is sufficient averment of employment on the estate, and duty to account to the trustee for behoof of the creditors. If in the course of the evidence, it shall appear that he was not employed, or his appointment not confirmed by the trustee, I shall have to give such a direction to the Jury as the facts proved may require. I am of opinion that this charge is relevant.

I am also of opinion that the second charge is relevant. The objection is that the schedule does not state the places where the various sums of money were received, and some countenance is given to this by the case of Scott ; but that was a special one. In a case of embezzlement special circumstances arise which may be in the interests of justice that, where peculiarities, these should be introduced into the indictment, in order that the accused may know the facts constituting the crime. There are no peculiarities

case to distinguish it from one of ordinary embezzlement. The prosecutor has, in the schedule annexed to the indictment, stated the time, the sums, and the addresses of the persons from whom the sums were received by the panel, but has not stated the places where he received them. Time and place are always necessary in an indictment, but not for the purpose of informing the accused of the evidence to be led, but for the purpose of showing him how the crime was committed. The receiving money is not the crime, but the appropriation, the place of which is stated; and it is in connection with the latter that time and place are essential. I have no doubt as to the relevancy of this charge according to the usual practice of this Court.

The indictment was accordingly held to be relevant, and the panel pleading not guilty. Evidence was thereupon adduced, in the course of which the Advocate-Depute proposed to shew to Robert Steven, a witness for the prosecution, a document purporting to be a deposition of the panel in William Ireland's sequestration, and to ask him whether the said document shews that in the course of that deposition, the question was put to the panel—'Where is the £383 odds that you admit having received back from Mr Menzies?'

RHIND, for the panel, objected to the competency of this question, and contended that in respect of the deposition not being voluntary on the part of the panel, and being in this respect unlike a declaration, it could not be used against him. The objection was sustained, and the question was held to be inadmissible,—Lord M'Laren observing that, unless in a very exceptional case, the proceedings in one Court in a different case could not be used as evidence against a prisoner in the Criminal Court.

The Jury found the panel guilty of both charges as libelled, and he was sentenced to imprisonment for six calendar months.

Agent for the Panel.—W. JOHNSTON, Writer, Dundee.

1885.

No. 74.  
Alex. Gilruth  
Fleming.

High Court,  
Feb. 21 and  
March 23.

Theft,  
Breach of  
Trust and  
Embezzlement.

CASES BEFORE THE HIGH COURT

Present,

LORDS YOUNG, CRAIGHILL, and M'LAREN.

MALCOLM MATHESON AND OTHERS, Suspenders—*C. J. Pearson and Kennedy.*

AGAINST

WILLIAM ROSS, Respondent—*R. V. Campbell.*

SUMMARY JURISDICTION ACTS, 1864 AND 1881 — COMPETENCY OF  
CHARGE OF DEFORCEMENT AND ASSAULT UNDER SUMMARY JURIS-  
DICTION ACTS—COMPLAINT—STATUTE 27 AND 28 VIC., c. 53  
(Summary Procedure Act), SEC. 5—DATE OF OFFENCE, AMEND-  
MENT OF AFTER COMMENCEMENT OF THE TRIAL, TO MEET EVIDENCE  
LED—EXAMINATION AS A WITNESS BY THE SHERIFF OF A PERSON  
NEITHER CITED NOR SWORN.

Held that the offences in a Summary complaint which charged the  
crimes of deforcement and assault might competently have been  
tried under Sir William Rae's Act (9 Geo. IV., c. 29), and were  
competently brought under the Summary Jurisdiction Acts: that  
an amendment of the date of the alleged offence was therefore  
competently made in terms of the provision in section 5 of the  
Summary Procedure Act, 1864, after trial had been begun, and  
the prosecutor's case closed, the accused having been offered an ad-  
journment of the case, and the change of date making no difference  
in the character of the offence charged, nor causing any injustice.  
In the course of the trial the Sheriff-substitute examined a person  
who was neither sworn nor cited by either side. Held that as  
what was then elicited was impertinent to the case, it did not  
afford a good ground of objection to the conviction.

1885.

No. 75.

Matheson

v.

Ross.

High Court,

March 19.

Suspension.

THIS was a Bill at the instance of MALCOLM  
MATHESON, son of a crofter, living in Valtos, in the  
parish of Uig, in the island of the Lews, and  
others, for suspension of a conviction pronounced by  
Sheriff-substitute of Ross-shire at Stornoway (J  
Black, Advocate), on a complaint under the Sum-  
mary Jurisdiction Scotland Acts, 1864 and 1881, which  
set forth—

‘That all and each or one or more of’ the said suspend-  
ers ‘been guilty of the crime of deforcement and obstructing ar-  
rest of the law or his assistant while engaged in the execution

ty : As also of the crime of assault, aggravated by the same  
 ving been committed to the injury of the person : As also of the  
 me of breach of the public peace, or of one or more of said  
 mes, actors or actor, or art and part : In so far as (*First*),  
 orge Nicolson, messenger-at-arms,' . . . 'having been instructed  
 or on behalf of the pursuers of the action hereinafter mentioned  
 execute the summons in said action by serving a copy thereof  
 each of the defenders mentioned therein, namely, by or on  
 half of the pursuers of an action of declarator, interdict, and  
 mages raised in the Court of Session at the instance of James  
 ackenzie, tacksman of the farm of Linshader, in the said parish of  
 ig, with consent and concurrence of Dame Mary Jane Perceval  
 Matheson, heritable proprietrix in liferent of the said farm,—  
*pursuers* ; against (*First*), Certain persons, all crofters, squatters,  
 sub-tenants in the township of Tobson, situated in the said  
 parish of Uig,' viz., . . . 'and others ; (*Second*), Certain persons,  
 all crofters, squatters, or sub-tenants in the township of Aird  
 ige, situated in the said parish of Uig, viz.,' . . . 'and others ;  
 (*Third*), Certain persons, all crofters, squatters, or sub-tenants in the  
 township of Valtos aforesaid, viz.,' . . . 'and others ; and (*Fourth*),  
 certain persons, all crofters, squatters, or sub-tenants in the township  
 Kneep aforesaid, viz.,' . . . 'and others,—*Defenders* ; in which action  
 the summons was signeted at Edinburgh on the twenty-ninth day of  
 November eighteen hundred and eighty-four, and contained warrant  
 of citation : And the said George Nicolson having, along with Donald  
 Macdonald, then and now or lately ground officer, and then and now  
 or lately residing at Doune, Carloway, in the said parish of Uig, who  
 acted as his assistant and concurrent, served copies of the said  
 summons on several of the defenders therein mentioned, and having  
 on or about the eighth day of November [this word 'November'  
 was deleted, and the word 'December' substituted in the margin,  
 and signed by the Sheriff-substitute] eighteen hundred and eighty-  
 four, proceeded to the dwelling-house at Valtos aforesaid, then and  
 now or lately occupied and possessed by Widow Catherine Macleod,  
 crofter, No. 31 of said township of Valtos, one of the defenders  
 mentioned in the said summons, for the purpose of serving upon the  
 said Catherine Macleod a copy thereof, they, the said' suspenders 'did,  
 all and each, or one or more of them, with the aid and assistance of  
 a large number of unruly persons whose names are at present to  
 the complainer unknown, wickedly and feloniously place themselves  
 in front of the door of the said dwelling-house, and forcibly resist  
 and obstruct the said George Nicolson and his said assistant and  
 concurrent, and prevent them from approaching the said door, and  
 from entering the said dwelling-house, and from serving the said  
 copy summons upon the said Catherine Macleod : ' [There was then

1885.

No. 75.  
 Matheson  
 v.  
 Ross.

High Court,  
 March 19.

Suspension.

1885. set forth, in like terms, two other acts of deforcement while said  
 No. 75. summons was being served on the same day upon two of the other  
 Matheson defenders therein, viz., upon Angus Morison, crofter, and John  
 v. Matheson, squatter] ‘and all this the said’ [here followed the names  
 Ross. of the accused], ‘or one or more of them, did, well knowing, or  
 High Court, having good reason to know, that the said George Nicolson was an  
 March 19. officer of the law then engaged in the execution of his duty as above  
 Suspension. mentioned, and that the said Donald Macdonald was his assistant  
 and concurrent therein, by all which, or part thereof, the said  
 George Nicolson and his assistant and concurrent were deforced  
 and obstructed in the execution of their said duty. Likeas (*Second*)’  
 [Here followed two charges of assault].

During the trial and after the close of the prosecutor’s case, it was found that there was an error in the complaint in specifying the day on which the deforcement was alleged to have taken place. The Procurator-fiscal then moved to have the complaint amended to the extent of deleting the word ‘*November*’ and substituting ‘*December*.’ The agents for the panels objected to this being done, but the Sheriff-substitute allowed and directed the amendment to be made, which was accordingly done and authenticated as the statute required.<sup>1</sup>

The trial thereafter proceeded, and in the course of the examination of the second witness for the defence, the Bill of Suspension states—

---

<sup>1</sup> Statute 27 and 28 Vic., cap 117 (Summary Procedure Act, 1864).

Section 5—‘No objection shall be allowed by the Court to any complaint under this Act for any alleged defect therein in substance or in form or for any variance between any such complaint and the evidence adduced on the part of the prosecutor or complainer at the hearing thereof not changing the character of the offence charged: but if any such objection or variance shall appear to the Court to be such that the respondent has been thereby deceived or misled, it shall be lawful to the Court to adjourn the hearing to some future day, and at the same time or at any stage of the proceedings to direct such amendment to be made upon the complaint as may appear to be requisite, not changing the character of the offence, and such amendment shall be authenticated by the signature or initials of the judge or clerk of Court.’

Stat. 8. In the course of examination of Murdo MacIennan, fisherman, Valtos, the second witness for the panels, the Sheriff interrupted the examination-in-chief, and put the questions, and took as evidence the answers which follow, the witness having said that a week after the alleged deforcement, he had attended a meeting presided over by the Rev. Mr M'Iver, minister of the parish of Uig:—*The Sheriff*.—At the meeting of which you have spoken, at which the Rev. Mr M'Iver presided, did he explain that the summonses which had been left by the officers meant that the big farmers wanted the crofters and others to take their cattle off the big farmers' land?—I don't remember. Did the Rev. Mr M'Iver ever tell the people to take their cattle off the islands?—I don't know; I would have remembered if Mr M'Iver had ever told us that. Did Mr M'Iver ever, to your knowledge, advise people to take the cattle off the islands? . . . His Lordship repeated the question, to which the witness answered, that he did not know whether the Rev. Mr M'Iver had so advised any one.' The said evidence was entirely incompetent and irrelevant to the issue.

Stat. 9. The Sheriff-substitute then put the said Rev. Angus M'Iver, who was present in Court, into, or close to, the witness-box, at his own hands, against the protest of the agent for the panels, and without putting him on oath. He was then subjected by the Sheriff to a lengthened examination regarding his antecedents, the composition of his congregation, the number of persons formerly belonging to the Free Church who had joined the Established Church, regarding the general state of the parish, alleged attempts at murder (which were merely imagined by the Sheriff), and his views of land law reform, the views on political topics entertained by the crofters, including the prisoners, and the contents of the sermons which he had recently preached. The said examination of one who was not cited or called as a witness in the cause was illegal and incompetent. The questions asked were irrelevant and incompetent, and the answers thereto formed part of the grounds of judgment of the Sheriff. Thereafter some formal evidence was given, and the diet was again adjourned till next day, when the agents of the parties were heard, and the sentence complained of was pronounced.

Stat. 10. Although the Sheriff-substitute by said sentence found the complainers guilty of having committed the alleged offence on 8th December, the witnesses for the prosecution swore that it had been committed on 8th November, and no other evidence was led as to the date of the alleged offence. Not only was the alteration of the libel illegal and incompetent, but the finding of the Sheriff-substitute was contradicted by the evidence for the prosecution.

1885.

---

 No. 75.  
 Matheson  
 v.  
 Ross.

---

 High Court,  
 March 19.

---

 Suspension.



1885.

No. 75.  
Matheson  
v.  
Ross.

High Court,  
March 19.

Suspension.

Stat. 11. The procedure in the course of the trial, and the evidence of the said Angus M'Iver, was arbitrary and illegal, and amounted to injustice and oppression. Further, the said Sheriff in convicting the complainers proceeded not only on the incompetent and illegal evidence or statements referred to, but also on supposed circumstances of which no evidence whatever had been led, and of which he could have no judicial knowledge; in particular, that 'all the agrarian lawlessness in the island had been perpetrated by those connected with the Established Church,' and referred to statements which a gentleman volunteered to him (the Sheriff) in private conversation. A report of the said judgment is produced and referred to for its terms. It may be explained that the complainers reside in the parish of Uig, and are adherents of the Established Church.

The Sheriff-substitute thereafter pronounced the following sentence—

*Stornoway, 21st February 1885.*—The Sheriff-substitute, in respect of the evidence adduced, Finds the said Murdo Macdonald, Peter Matheson, John Macaulay (the younger), and Peter Macdonald, guilty of the crime of deforcing and obstructing an officer of the law or his assistant while engaged in the execution of their duty, charged; as also of the crime of assault charged, but not of the aggravation thereof libelled; and the said Malcolm Matheson and Angus Maclean guilty of the crime of assault charged, but not of the aggravation thereof libelled; and the said Donald Morison guilty of the crime of deforcing and obstructing an officer of the law or his assistant while engaged in the execution of their duty, charged; and the said Duncan Graham guilty of the crime of assault charged, but not of the aggravation thereof libelled: And therefore decerns and adjudges each of the said Murdo Macdonald, Peter Matheson, and Duncan Graham to be imprisoned for the period of ten days from this date, and thereafter to be set at liberty; decerns and adjudges the said Angus Maclean to be imprisoned for the period of seven days from this date, and thereafter to be set at liberty; decerns and adjudges each of the said Malcolm Matheson and Peter Macdonald to be imprisoned for the period of thirty days from this date, and thereafter to be set at liberty; decerns and adjudges the said Donald Morison to be imprisoned for the period of forty days from this date, and thereafter to be set at liberty; and decerns and adjudges the said John Macaulay (the younger) to be imprisoned for the period of fifty days from this date, and thereafter to be set at liberty: And for these purposes grants warrant to officers of the law to convey the said Murdo Macdonald, Peter Matheson, Duncan Graham, Angus Maclean, Malcolm Matheson,

Peter Macdonald, Donald Morison, and John Macaulay (the younger) from the Bar to the prison of Stornoway, thereafter to be dealt with in due course of law : And dismisses the complaint in so far as regards the said Kenneth Maclean.

1885.

No. 75.  
Matheson  
v.  
Ross.

The suspenders pleaded that the sentence complained of should be suspended in respect, *inter alia*—

High Court,  
March 19.

Suspension.

(1) Incompetent and irrelevant evidence was admitted against the complainers. (2) The Sheriff examined a person not called as a witness by the Crown or the panels, and not sworn, in the course of the complainers' evidence. (3) The Sheriff acted oppressively, unjustly, and with partiality throughout the trial of the complainers, and transgressed the fundamental rules of justice. (4) The said amendment of the libel, specially at the stage at which it was made, ought not to have been allowed ; or otherwise, no evidence whatever was led to support the conviction complained of. (5) The said conviction is void from uncertainty.

KENNEDY, for the suspenders.—The whole proceedings should be quashed in respect the Sheriff-substitute allowed a material alteration in the complaint when it was not competent to do so. The amendment was incompetent, but if competent and made, there was no evidence to convict, as the evidence had reference to a crime committed on the 8th November, and the complaint charged crimes committed on the 8th December. The case is not one to which the Summary Procedure Act, 1864, applies, in respect it is one which could not have been tried summarily at the passing of the Summary Procedure Act, 1864, under Sir Wm. Rae's act ; the act 9 Geo. IV., c. 29. The case should have been tried with a jury. *Bute v. More*, High Court, Nov. 24, 1870, Couper, vol. i., p. 495 ; Hume, vol. ii., p. 180. The Court has refused to allow a conviction to stand where an amendment had been made after evidence had been led as to the *locus* of a crime when there was no *locus* stated. *Stevenson v. M'Levy*, High Court, Feb. 21, 1879, Couper, vol. iv., p. 196. In the case of

1885. *Maxwell v. Black*, High Court, June 1, 1860, Irv.,  
 No. 75. vol. iii., p. 592, the Court set aside a conviction  
 Matheson where the *locus delicti* was said in the complaint  
 v. to be in the parish of Auchtermuchty, but at the trial  
 Ross. was proved to be in the parish of Collessie. There is  
 High Court, no case in which an amendment has been made before  
 March 19. proof. Secondly, the Sheriff has admitted incompetent  
 Suspension. evidence by examining Mr M'Iver, who was not sworn,  
 and was not called by either party. The answers by  
 Mr M'Iver prejudiced the Sheriff's mind, and persuaded  
 him that there was a state of terrorism in the island,  
 and that nobody could safely give evidence against the  
 panels; and this has caused the Sheriff to disbelieve the  
 witnesses for the defence, who said that no deforcement  
 took place, and so act in a partial and unjust manner.  
 In the case of *Wynn v. Lindsay*, High Court, No-  
 vember 22, 1883, Couper, vol. v., p. 370, the Court set  
 aside a conviction, a witness having been sworn and  
 examined, but whose name was not on the list.  
 Further, the conviction fails from uncertainty. The  
 charge is alternative, viz., of deforcing an officer or his  
 assistant, and the conviction is in the same terms. The  
 suspenders are entitled to know whether it was the one  
 or the other, or both, that were deforced. The assistant  
 could not be deforced. *Reaney v. Maddever*, 22nd  
 November 1883, Couper, vol. v., p. 367.

R. V. CAMPBELL, for the respondent.—The change in  
 the date could competently be made under the powers  
 conferred by section 5 of the Summary Procedure Act.  
 The propriety of allowing this change was by the statute  
 left to the discretion of the judge trying the cause, and  
 this discretion should not be interfered with except on  
 the ground of injustice; and the appeal would be to the  
*mobile officium* of the Court. If there had been no  
 date it is possible that the complaint would not have  
 stood; but if the date was wrong, it may be changed at any  
 stage of the proceedings, so long as no injustice is done,  
 and there is no change made in the character of the

offence charged, 27 and 28 Vict., c. 53, sec. 5. An amendment was allowed before trial even in a murder case of an impossible date.

LORD YOUNG.—But that was at the request of the prisoner's counsel, the Dean of Faculty, and also of the Crown Counsel.

R. V. CAMPBELL.—No doubt, but still it was made; and in the case of *Jackson v. Jones*, High Court, 1st June 1867, Irv., vol. v., p. 409, the alteration of date from 11th October 1866 to 11th or 12th October 1867 was held competent before trial, in respect it did not affect the character of the offence charged in the sense of the Act of 1864, section 5: and in England the procedure seemed practically the same. Any variance between the information and the evidence led in support of it is cured by sections 1 and 9 of the Act 11 and 12 Vict., c. 43 (Jervis' Act). Paley on Summary Convictions, p. 81. Accordingly, in the case of *Ouley v. Gee*, 7th May 1861, IV. Law Times, p. 338, the conviction by the magistrates of keeping a house open for betting on the 8th November, the charge being of 'keeping a house open for betting on the 5th October and on divers other days and times between the said 5th October and the laying of the said information' (the 16th November following), was affirmed; the variation not being material and not having misled the accused. In the case of *Ralph v. Hurrell*, 31st May 1875, xliv. Law Journal, Mag. Cas., p. 145, where the accused was charged with damaging a lamp, the property of three persons, and the evidence did not show it was the property of these persons; the judges held that while the variance would be fatal at Common Law, it was cured by Jervis' Act, and the case was remitted to the Justices to proceed. Lastly, the case was competently tried by the Sheriff, under the Summary Jurisdiction Acts, without a jury. No jury was asked by the accused. In the case of *Mackenzie v. Fraser*, High Court, 25th October 1882, Couper, vol. v., p. 124, the Court upheld a conviction

1885.

No. 75.  
Matheson  
v.  
Ross.

High Court,  
March 19.

Suspension.

1885. before the Sheriff in a case of mobbing and rioting, the facts there almost amounting to a deforcement.

No. 75.  
Matheson  
v.  
Ross.

High Court,  
March 19.

Suspension.

LORD YOUNG.—The appellants here were brought to trial before the Sheriff-substitute of Ross-shire, at Stornoway, for the crime of deforcement and assault, and were convicted and sentenced by him to various periods of imprisonment. The conviction and sentence is complained of, first, upon the ground that the Sheriff allowed the complaint on which it proceeded to be amended in the date in the course of the trial, and, indeed, after the close of the prosecutor's evidence. The date originally stated in the complaint as the date of the offence was the 8th of November 1884. On that day, the prosecution alleged the appellants had deforced and assaulted an officer and his assistant in the exercise of his duty in serving summonses, dated the 29th November, or three weeks after the offence was said to have been committed. Although it was plain that the dates were incompatable, and one or both must be wrong, it did not appear on the face of the libel which was wrong, or whether both were wrong. But I assume, for that alone is consistent with the course the case took, that the real date was 8th December, and accordingly that was the date the Sheriff allowed in the course, or rather at a late period, of the trial to be substituted for the original one of 8th November. The question is whether he was lawfully entitled to allow that amendment at that stage. Now one thing is quite clear, assuming December to be right, and not November, that no injustice was done in making the change, and it is not suggested that any injustice or disadvantage has been suffered. Of course that is subject to the observation that, if the amendment was illegal, the appellants were legally entitled to any unearned advantage out of the prosecutor's error, of which they were deprived by the amendment. But I take it that they suffered no disadvantage and were put to no inconvenience. I mean that they were in no way

prejudiced in their defence or put to any greater peril by the amendment than they would have been if the Act had been right at first.

Now, taking the case so, was the amendment legal? I think the prosecution would have been competent under the Act 9 George IV., c. 29, Sir Wm. Rae's Act; I do not agree with Mr Kennedy's argument that a case of deforcement such as this—an assault upon an officer of the law in the execution of his duty—could not be competently tried under that Act. It might be more or less discreet to try it under that Act, and there are certainly many cases of deforcement and assault which might with perfect propriety be so tried. But as to the competency of so trying such a case I cannot entertain a doubt for a moment. If it had been so tried, the prayer of the complaint would have invited the punishment on the very face of it. But even the Summary Procedure Act of 1864 applies expressly to all complaints before the Sheriff in the exercise of the summary jurisdiction conferred upon him by the Act 9 George IV., c. 29; that is to say, it applies to all complaints which, before the statute, might competently have been brought under the older Act of Geo. IV. The complaint here bears on the face of it that it is under the Summary Jurisdictions Acts of 1864 and 1881, and the punishment which, under the Act of Geo. IV., is limited by the terms of the complaint, does not require in this prosecution to be limited to the prayer as under the Act of George IV., because in all prosecutions under the Summary Procedure Act the punishment is limited by statute, and the Act of 1881, which is one of the Acts mentioned in the title of the complaint, prohibits for the future any prosecution under 9 Geo. IV., and *requires* that any which previously would have been brought under it should thereafter be brought under the Acts 1864 and 1881. The importance of these observations is that clause 5 of the Act of 1864 provides that no objection shall be

1885.

No. 75.  
Matheson  
v.  
Ross.

High Court,  
March 19.

Suspension.

1885. allowed by the Court to any complaint under this Act  
or for any alleged defect therein in substance or in form  
or for any variance between any such complaint and the  
evidence adduced on the part of the prosecutor or complain-  
er at the hearing thereof, not changing the character  
of the offence charged; but if any such objection or  
variance shall appear to the Court to be such that the  
respondent has been thereby deceived or misled, it  
shall be lawful for the Court to adjourn the hearing  
till some future day, and at the same time, or at any  
stage of the proceedings, to direct such amendment to  
be made upon the complaint as may appear to be  
requisite, not changing the character of the offence;  
and such amendment shall be authenticated by the  
signature or initials of the Judge or Clerk of Court.  
Now I think that in the Sheriff's place it would  
not have occurred to me that the accused could  
take any prejudice from the amendment being made  
upon the spot when the error was pointed out;  
nevertheless, I think the Sheriff acted with becoming  
discretion when he offered to the accused or their  
agent to adjourn the case if they desired it. No  
such desire was expressed, and the amendment was  
ordered and authenticated as the statute required. I  
cannot think that this amendment was other than com-  
petent. It differs from an amendment of the *locus*,  
because that may raise a question of jurisdiction. As it  
is not of that nature, we have not to determine any such  
question as was raised in the case of *Stevenson* cited,  
Couper, vol. iv., p. 495, in which the Appeal Court  
declined to sanction the insertion of a *locus* for the first  
time after the conclusion of the evidence, to fit the  
evidence that had been led. The matter in the present  
case is one of time, and I assume that the evidence  
upon which the appellants were convicted, of violent  
conduct upon the 8th December, applied to that date.  
In one view, and I think the right view, of clause 5 of  
the Summary Procedure Act, the Sheriff might have



proceeded upon that evidence, and made his conviction apply to the 8th December, disregarding the discrepancy between that date and the 8th November. The magistrate is required to proceed on the truth of the substance of the matter, disregarding any such discrepancy owing to an error; but I think the Sheriff acted properly in correcting the error, and, indeed, that was necessary if a conviction was to be made by reference to the complaint.

On the other grounds of objection to this conviction, they are not such, as we think, call for any reply. I shall not assume the statements which were made as to the Sheriff's conduct, except for the purpose of deciding this case. We have had no statement or explanation from him, but taking it that he entered into an irregular and impertinent—in the sense of not being pertinent to the subject—conversation with a clergyman who was present, and put questions to him which had 'no bearing on the case, I am not of opinion that his having done so affords any ground for our interfering with the conviction. So far as I can make out from the statements made to us, the Sheriff thought that Mr M'Ivor was a person likely to be able to influence the accused, who, he thought, were engaged in lawless proceedings by pasturing cattle on other people's land, and that probably those summonses, in the service of which the messenger was deforced, would be received with violence, and he wished to have Mr M'Ivor's influence exerted, so as to bring them to a better state of mind. We cannot enter on that. I may have my own views as to whether it was judicious to enter on that course in a Court of Justice, but I am not prepared to attribute any improper motive to the Sheriff, and I cannot see anything favouring or suggesting the notion of improper motive. But it is sufficient to say on this head that whatever we may think or not think about this Sheriff's conduct, the examination of Mr M'Ivor had really no bearing on the case, and nothing was said to the Sheriff by Mr

1885.

---

No. 75.  
Matheson  
v.  
Ross.

---

High Court,  
March 19.

---

Suspension.

---

1885. M'Ivor that would prejudice his mind against the accused or make their case appear worse to him.

No. 75.  
Matheson  
v.  
Ross.

High Court,  
March 19.

Suspension.

The only other point is the alternative in the conviction, the appellants having been convicted of having deforced an officer of the law *or* his assistant.—It is a pity assault is mentioned ;—it would have been sufficient to charge the deforcing of the messenger in the execution of his duty, as the assistant could not be deforced. If the officer was not deforced, there was no case at all. If it was thought necessary to put in, that he had an assistant along with him at the time, that could have been done without any alternative, and whether it had been proved or not was of no significance. But the crime is stated as having a *nomen juris*—as deforcing and obstructing an officer of the law *or* his assistant while engaged in the exercise of their duty ; but the complaint goes to show that this was done by deforcing the officer *and* his assistant, and the sentence convicted them of deforcing the officer *or* assistant, as in the charge. It is not nicely or skilfully done either in the complaint or conviction, but I think it is substantially sufficient, and I should be loath to interfere with a conviction which otherwise seemed unimpeachable. Upon the whole matter, I am of opinion that the appeal is not well founded, and ought to be refused.

LORDS CRAIGHILL and M'LAREN concurred.

The following was the Interlocutor :—

'*Edinburgh, 19th March 1885.*—Having considered this Bill, and heard counsel for the parties, Refuse the Bill, and decern : [Warrant also granted to re-apprehend and imprison the complainers Malcolm Matheson, Peter M'Donald, Donald Morison, and John Macaulay, the younger].

Agents for Complainers—CARMENT, WEDDERBURN & WATSON, W.S.  
CROWN AGENT.

Present,

LORDS YOUNG, CRAIGHILL, and M'LAREN.

PETER WALKER and OTHERS, Suspenders—*Gunn*.

AGAINST

GEORGE RODGER, Respondent—*Darling*.

STATUTE 27 AND 28 VIC., c. 53 (Summary Procedure (Scotland) Act, 1864—STATUTE 20 AND 21 VIC., c. CXLVIII., SEC. 96 (Tweed Fisheries Act, 1857)—SUSPENSION—COMPETENCY—STATUTE 22 AND 23 VIC., c. LXX., SEC. 8 (Tweed Fisheries Act, 1859).—*Held* that notwithstanding the terms of the 96th section of the 'Tweed Fisheries Act, 1857,' which is incorporated in the 'Tweed Fisheries Act, 1859,' prohibiting a review of a conviction pronounced by any Sheriff under the provisions of the latter Act, except by appeal to the next Circuit Court, a suspension before the High Court was competent of a conviction of the offence charged pronounced upon a complaint which charged a contravention of the 8th section of the Act of 1859, but which did not set forth facts which necessarily implied a contravention of that Act.

Four men were charged with a contravention of section 8 of the 'Tweed Fisheries Act, 1859,' by taking salmon by 'light and leister, or otherwise to the prosecutor unknown,' during the annual close time, but on a day on which fishing by rod and line was legal, and they were convicted of the contravention charged. The conviction quashed, and sentence following thereon suspended, in respect that there was nothing set forth in the complaint to show that the fish might not have been caught in a lawful manner.

THIS was a Suspension at the instance of PETER WALKER and GILBERT TAYLOR, farm servants, residing at West Redfordgreen, and JOHN CROZIER, shepherd, residing at Deloraine Shiel, both in the county of Selkirk, of a conviction and sentence pronounced by the Sheriff-substitute at Selkirk (C. G. Spittal, Advocate), upon a complaint under the Summary Procedure Act, 1864, charging them with a contravention of the 8th

1885.

---

 No. 76.  
 Walker  
 v.  
 Rodger.

---

 High Court,  
 March 19.

---

 Suspension.

1885. section of the Tweed Fisheries Act, 1859 (22 and 23  
 No. 76. Vic., c. lxx).<sup>1</sup>  
 Walker

<sup>v.</sup>  
 Rodger.

High Court,  
 March 19.

Suspension.

IN SO FAR AS, on the 1st day of November 1884 years, or about that time, being during the annual close-times specified in 'The Tweed Fisheries Amendment Act, 1859,' the said Peter Walker, Gilbert Taylor, and John Crozier did, all and each, or one or more of them, fish for or take, or aid or assist in fishing for or taking, two or thereby salmon in or from Rankle Burn, which flows or runs into the River Tweed, and in or from parts of said burn at or near Craighill End Stream and Weeding Cleuch, or one or other of them, in the parish of Ettrick and county of Selkirk, and that by means of a light and leisters, *or otherwise to the complainers unknown.*

The diet was held at Selkirk on 26th November 1884, when the Sheriff-substitute sustained the relevancy, and, after hearing evidence, pronounced the following conviction and sentence :—

'The Sheriff-substitute, in respect of the absence of the said Gilbert Taylor, and in respect of the evidence adduced against the said Peter Walker and John Crozier, convicts the said Gilbert Taylor, Peter Walker, and John Crozier, of the contravention charged, and therefore adjudges the said Gilbert Taylor, Peter Walker, and John Crozier to forfeit and pay the sum of £5 each of penalty, with the sum of 10s. each of expenses ; and in default of immediate payment thereof, adjudges the said Gilbert Taylor,

---

<sup>1</sup> Statute 22 and 23 Vic., cap. lxx. (The Tweed Fisheries Act, 1859).

Section 6.—'It shall not be lawful for any person to fish for or take, or aid or assist in fishing for or taking, any salmon in or from the river at any time between the 14th day of September in any year and the 15th day of February in the year following, except by means of rod and line, and with the artificial fly only ; nor with the rod and line at any time between the 30th day of November in any year and the 1st day of February in the year following, and which respective periods above defined shall be, and be held to be, the annual close-times within the meaning of the recited Act and this Act.' . . .

Section 8.—'Every person who, during the annual or weekly close-times, fishes for or takes, or aids or assists in fishing for or taking, any salmon in or from the river, excepting as aforesaid, shall be liable.' . . . &c.

Peter Walker, and John Crozier to be imprisoned for the period of thirty days from the date of imprisonment, unless the said sums shall be sooner paid; and grants warrant to officers of Court to apprehend and convey them to the prison of Selkirk, and to the keeper thereof to receive and detain them accordingly.' The fines and expenses were paid by the complainers.

1885.

No. 76.  
Walker  
v.  
Rodger.

High Court,  
March 19.

Suspension.

In the Bill it was pleaded :—

The said conviction and sentence were illegal and unwarrantable, and should be suspended, in respect that—(1) the complainers were innocent of any contravention of the said 8th section of 'The Tweed Fisheries Amendment Act, 1859,' and no contravention thereof was relevantly set forth, as fishing by rod and line with artificial fly, which is specially exempted by said section of said Act, might be embraced in the words, 'by means of a light and leisters, or otherwise to the complainer unknown;' (2) if leistering was the offence, the 63rd section of 'The Tweed Fisheries Act, 1857' (20 and 21 Vic., cap. cxlviii.), ought to have been libelled; and (3) the Rankle Burn does not flow or run into the River Tweed, but into the River Ettrick, which joins the Tweed about fifteen miles further down. The conviction and sentence complained of ought therefore to be suspended, with expenses, as craved, in respect—(1) the complaint was irrelevant, and the conviction and sentence following thereon was null and void; (2) if leistering was the offence charged, the wrong section and Act were libelled; (3) the complaint was alternative, while the conviction was general; and (4) the complaint was untenable in fact and in law.

DARLING, for the respondent, objected to the competency of the appeal.—By the 96th section<sup>1</sup> of the Tweed

<sup>1</sup> Statute 20 and 21 Vic., c. cxlviii. (Tweed Fisheries Act, 1857).

Section 96.—'It shall be lawful for the complainer, or for any person charged, to appeal against any adjudication or conviction pronounced by any Sheriff, or Justice or Justices in Scotland, with respect to any complaint, or penalty, or forfeiture under the provisions of this Act, by which he thinks himself aggrieved; and in case such adjudication or conviction shall be pronounced by any Sheriff, the appeal therefrom shall be made to the next Circuit Court of Justiciary in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the Act passed in the 20th year of King George the Second, for taking away and abolishing heritable jurisdictions in Scotland, . . . and it shall not be

1885. Fisheries Act, 1857, 20 and 21 Vic., c. cxlviii., which  
 No. 76. is incorporated in the Act of 1859, the Act here libelled,  
 Walker an appeal from the Sheriff must be made to the next  
 v. Circuit Court of Justiciary under the rules, &c., pre-  
 Rodger. scribed by the Heritable Jurisdictions Act, and it is  
 High Court, declared that 'it shall not be competent to appeal from,  
 March 19. or bring any adjudication . . . or conviction pronounced  
 Suspension. by any Sheriff' . . . 'acting under this Act, under  
 review in any other way than as herein provided, viz.,  
 by appeal to the next Circuit Court, and the decision  
 of the Circuit Court in any of the matters is declared to  
 be final, and not subject to review by advocacy, sus-  
 pension, reduction, or any other process whatever.' This  
 Bill of Suspension is therefore incompetent. *Clark v.*  
*Bathgate*, High Court, 8th February 1872, Couper,  
 vol. ii., p. 195.

LORD YOUNG.—This Suspension is not to the relevancy  
 of the complaint, but to the conviction which, by refer-  
 ence to the complaint, bears that the suspenders took  
 salmon by means of light and leisters, 'or otherwise to  
 the complainers unknown.'

DARLING.—The case of *O'Neills v. Campbell*, High  
 Court, 18th July 1883, Couper, vol. v., p. 305, was  
 similar in character to the present case.

LORD YOUNG.—The present is quite a different case  
 the suspender is charged with, and convicted of havin-  
 taken salmon in a way to the prosecutor unknown.

DARLING.—The objection is not to the nullity of the  
 charge. It is an objection only to the way in which it  
 is stated. If such an objection was to have been taken  
 it should have been stated at the outset in the Sheriff Court,  
 and cannot now be heard.

---

competent to appeal from or bring any adjudication or conviction  
 pronounced by any Sheriff, or Justice or Justices acting under this  
 Act, under review in any other way than as herein provided; and  
 the decision of the Circuit Court of Justiciary . . . shall be final  
 and not subject to review by advocacy, suspension, reduction, or  
 any other process whatsoever.'

Counsel for the respondent was not called on.

1885.

LORD CRAIGHILL.—I do not desire to throw doubt on the incompetency of any proceeding which can be fairly described as a process of review of a conviction pronounced in the Sheriff Court under the Tweed Fishing Acts, brought otherwise than by the method prescribed in these Acts—that is, by appeal to the next Circuit Court. It seems to me that the present proceeding cannot be described as a process of review. In spite of such clauses of exclusion as are here founded on by the respondent, this Court has always held itself free to pronounce on, and if necessary quash any conviction which discloses that the convicting magistrate may have proceeded on a view of the facts not necessarily inferring an offence against the statute.

No. 76.  
Walker  
v.  
Rodger.

High Court  
March 19.

Suspension.

Now in this case the charge is that the appellants did fish for or take salmon by means of a 'light and leisters, or otherwise to the complainers unknown,' and the conviction by the Sheriff-substitute finds the suspenders guilty in respect of the evidence adduced against them of the contravention charged. What is the contravention? The appellants are charged with taking salmon in one way, by light and leister, with an alternative contained in these words, 'or otherwise to the prosecutor unknown.' Now, cannot we read in to these latter words, 'by rod and line'?—and salmon could be lawfully taken in that manner. That leads us to this—that the conviction convicts these men of catching fish, without excluding the possibility of their doing so in a lawful way. They have thus been found guilty of an offence which they may never have committed. I don't think fishing by rod and line is excluded by the words 'or otherwise to the prosecutor unknown,' and I am obliged, therefore, to come to the conclusion that the conviction cannot stand.

LORD M'LAREN.—I concur with Lord Craighill, and only add this, following a suggestion from your lordship in the chair, that I do not wish it to be understood that



1885.

No. 76.

Walker

v.

Rodger.

High Court,  
March 19.

Suspension.

I consider that the complaint framed in this way is necessarily objectionable on the ground of irrelevancy. If the complaint had merely stated in general terms that the accused had taken fish in some 'way to the prosecutor unknown,' that probably would have been irrelevant, because it would be doubtful whether the fish had not been taken in the way excepted by the statute. But where one way of taking is specified in the complaint, which is not within the exception, then the addition of *general* words covering any variation between the complaint and the evidence would not, as I regard the matter at present, make the complaint irrelevant, because it would be still sufficient to prove that the offence was committed in the manner set forth. But the conviction is the real point of objection. The Sheriff-substitute has not found them guilty of taking salmon by light and leister, but,—or otherwise to the complainers unknown. But the facts may be in accordance with perfect innocence, and need not necessarily be conclusive of guilt. The objection, then, being to the conviction and not to the complaint, appeal need not necessarily be taken to the Circuit Court. The proceedings are not taken under the Act, and the limitations of review therein do not apply. On these grounds I think the objection to the competency therefore fails.

LORD YOUNG.—I am of the same opinion. We have frequently decided that suspensions of a criminal charge such as this is are not excluded from the review of this Court by the clause founded on by Mr Darling. This suspension is not to review a conviction, but to quash, on the ground that it is illegal on the face of it; and in such a case we have not to consider the relevancy of the complaint, except in so far as it is imported by reference into the conviction. If, as more frequently happens than not, the conviction refers to the complaint for the facts of which the magistrate convicts the accused, the a suspension may be brought on the question of relevancy, for you read into the conviction the words of t



complaint; but I repeat an observation which I made in the course of the argument, that if the conviction is right on the face of it, *e.g.*, where the magistrate convicts the accused of having within closed time fished for salmon 'otherwise than by rod or line and artificial fly,' I would not at this stage have listened to any objection to the relevancy of the complaint, or interfere with the conviction. But I take leave to observe at the same time that I think it requires some ingenuity to see two ways of stating the complaint under the clause here libelled. That section specifies the close time during which it shall be illegal to fish for and take salmon, except by means of rod or line and artificial fly. And section 8, which imposes the penalty, provides that every person fishing during the close time, excepting as aforesaid,—that exception being by rod and line and artificial fly,—shall incur the penalty. It would have occurred to me that the proper way to lay such a charge was by a statement to the effect that the party was accused of, during close time, fishing for or taking salmon otherwise than by rod and line and artificial fly, and, if so put in the complaint, and a conviction obtained, there could be no objection. But in the way it has been done, these people are convicted of taking salmon in some manner to the prosecutor unknown. That is by no means an offence, necessarily at any rate, for the fish might have been taken in a manner perfectly legitimate at the time. There is really no difficulty in properly framing such a complaint, and I hope these observations will be attended to. It really is a pity to see miscarriages of justice through a technicality; for I have no reason in the world to doubt that the suspenders really took the salmon otherwise than by rod and line and artificial fly. The technicality has, however, so much of the form and aspect of substance, that I think we cannot, consistently with our precedents, disregard it in this Court.

The following was the Interlocutor:—

1885.

---

No. 76.  
Walker  
v.  
Rodger.

---

High Court,  
March 19.

---

Suspension.

1885. ' *Edinburgh, 19th March 1885.*—Having considered  
 No. 76. this Bill, and heard counsel for the parties, Pass the  
 Walker Bill : Suspend the conviction and sentence complained  
 v. of simpliciter, and decern : Find the complainers entitled  
 Rodger. to expenses, which modify to three guineas : for which,  
 High Court, and one guinea as the dues of extract, decern against  
 March 19. the repondent.  
 Suspension.

Agent for the Complainers—JAMES JUNNER, S.S.C.

Agents for the Respondent—MACKENZIE, INNES, & LOGAN, W.S.

---

Present,

The LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

HUGH GREENHILL, Appellant—*Kennedy.*

AGAINST

JAMES STIRLING, Respondent—*A. Graham Murray.*

PUBLIC HOUSE—HOTEL CERTIFICATE—MASTER AND SERVANT—  
 STATUTE 25 AND 26 VIC., CAP. 25, SEC. 2 (Public Houses Acts  
 Amendment (Scotland) Act, 1862)—TRAFFICKING BY SERVANT  
 AGAINST MASTER'S ORDERS.—A hotel-keeper is not liable to con-  
 viction for a breach of his certificate in respect of an act done by  
 a servant in his house in his absence and against his express in-  
 structions.

The keeper of an hotel having left his hotel on Sunday afternoon,  
 gave a female servant charge of the premises, and left in her care  
 some beer and whisky, with strict injunctions that she was to  
 admit no one to the house except *bona fide* travellers, nor to give  
 anyone, except *bona fide* travellers, beer or whisky. The servant,  
 in her master's absence, admitted an acquaintance, and gave him  
 a glass of whisky, taking the price of it from him and accounting  
 for it to her master. The master was convicted of a contraven-  
 tion of his certificate, but the Court quashed the conviction.

No. 77.  
 Greenhill  
 v.  
 Stirling.

High Court,  
 March 19.

Appeal.

THIS was an appeal against a conviction obtained at  
 the instance of JAMES STIRLING, the Burgh Fiscal, before  
 the Burgh Court at Forfar, convicting the appellant,  
 HUGH GREENHILL, Hotel-Keeper, Forfar, of the offence

charged in a summary complaint, charging an offence against the laws for the regulation of public houses, and within the meaning of the Public Houses Acts Amendment (Scotland) Act, 1862, and the acts therein recited, in so far as on 2nd November 1884, at and within his hotel, he 'did permit or suffer drinking therein, or on the premises belonging thereto, and did sell or give out the same on said day, the same being Sunday, not for the accommodation of lodgers or travellers, in breach of the terms of his said certificate; and such offence is a first offence.'

1885.

No. 77.  
Greenhill  
v.  
Stirling.

High Court,  
March 19.

Appeal.

The facts stated in the Case on appeal were, that the appellant and his wife left the hotel on the afternoon of the Sunday in question to visit a friend, having previously placed the hotel in charge of a waitress, Reid, who had been sixteen months in their service, there being only one other person in the house, viz., a maid-servant, who was cook. He locked up the bar and the front door and side door, leaving only a panel of the latter removed, so that Reid might see who desired to get in, and he gave strict injunctions that no one was to be admitted to the hotel except *bonâ fide* travellers. And in case any such should call, he gave Reid a bottle of whisky and some beer for their entertainment. In the course of the afternoon two men, well known to her as residing in Forfar, called at the hotel. They were admitted, and got a glass of whisky each, which was paid for by one of them, and the money was accounted for to her master. Reid swore that she gave the whisky 'as an obligation.' In these circumstances the magistrate, holding that the appellant was responsible for the actings of his servant, convicted him.

The question in the case was—

'Whether the facts proved are sufficient to warrant the conviction appealed against?'

KENNEDY, for the appellant, contended.—This is a case of the entertainment of her guest by a servant without the knowledge of the master. *Kay v. Gemmell*,

1885.

No. 77.  
Greenhill  
v.  
Stirling.

High Court,  
March 19.

Appeal.

13th Nov. 1884, *supra*, p. 535 ; *Smith v. Stirling*, 6th March 1874, Couper, vol. iv., p. 13. It is also a case of special employment for a limited time with special instructions. Reid was simply a waitress, and had not previously had a general charge in the hotel ; and the appellant having given strict orders, and done all he could to comply with the Act, the question is, Is he to suffer because of his servant having acted against his orders ? There is no authority for affirming any such proposition ; any authority that exists being the other way. The case of the *Duke of Roxburghe* against *Waldie*, 1st Mar. 1882, I. Shaw (N.E.), p. 34 — affirmed 10th Feb. 1825, I. W. and S., p. 1, shows that where a servant so acts the master is not liable in a civil claim. Here the men came to see Reid and the cook, and Reid, as being one of the household, was entitled to entertain the men ; and she could quite legally have purchased the whisky from the appellant and given it thereafter to the men. *Fleck v. Gemmell*, High Court, Oct. 27th, 1882, Couper, vol. v., p. 150.

LORD YOUNG.—This is an infringement of the revenue laws, and it has been decided long ago that in cases of contravention the master is liable for his servant's actings.

KENNEDY, for the appellant.—The cases only go the length of showing that the master is presumed to have authorised the actings of his servant done in the course of the employment with which he is entrusted unless the contrary be shewn. In none of the cases had the master given special instructions. The case of the *Duke of Roxburghe* makes clear that the master would not be liable for the actings of his servant against his orders. This is a criminal prosecution, and there have been several in England to the effect that, without knowledge brought home to him, the master would not be liable. In the case of the *Attorney-General v. Sir I. Crompton and Jervis*, p. 220, and *I. Tyrwhitt*, which was a suit for recovery of penalties for

ning revenue laws, the master was held liable for the  
of his servant. But there was evidence that the  
ster was doing the wrong and the servant was  
eening him, and the master had given no direct  
tructions to the servant. In the *Advocate-General*  
*Grant*, 20th July 1853, xv., D. 980, the master was  
victed because the servant acted within the sphere  
his employment; but Lord Rutherford thought that  
master would not be liable for direct crime of his  
vant within the sphere of his employment, nor for his  
gal acts done without his authority.

The LORD-JUSTICE CLERK.—If there were no special  
tructions, do you concede that the master would be  
le?

KENNEDY.—Yes; but there is no authority in Scot-  
d for holding the master liable where the servant  
acted against the master's direct instructions. In  
*Illens v. Collins*, 24th Jan. 1874, L. R., ix., Q. B., p.  
2, the master was held liable in penalties for the act  
his servant, but Mr Justice Quain, in delivering his  
nion, expressly says (p. 295), that if the act of the  
vant was clandestine he would not have been held  
le; which is the appellant's case. Perhaps some  
istance may be got from the Mines Regulation Act,  
ich imposes certain duties on owners or agents of  
nes. It has been held, in the case of *Dickenson v.*  
*etcher*, 17th Nov. 1873, L. R., ix., C. P., p. 1, that  
en the owner or agent has provided under that Act  
the due observance of the requirements of the Act,  
being unable to see to it personally, and no personal  
It is attributable to him, he is not liable in penalties  
the fault of the duly-authorised and qualified servant.  
e case for the appellant being one of a special  
ployment, with special instructions which had not  
n followed, the conviction should, we contend, be  
shed.

A. GRAHAM MURRAY, for the respondent. — The  
estion is whether the master is to be held liable for

1885.

No. 77.  
Greenhill  
v.  
Stirling.

High Court,  
March 19.

Appeal.

1885.

No. 77.  
Greenhill  
v.  
Stirling.

High Court,  
March 19.

Appeal.

the act of his servant, whether against his orders or not, and what it is that the Legislature intended should be provided against. Now in schedule A, No. 1 of 25 and 26 Vic., c. 35, under which this prosecution is brought, certain things are provided which render an innkeeper liable to penalties, and to some of the specified offences the qualification of 'knowingly' done or permitted is adjoined, and there are other provisions which are not safeguarded. The supplying drink on Sundays to people not *bond fide* travellers is not among those provisions which the legislature has added 'knowingly;' the clear implication from this being that the Legislature intended that the innkeeper should be liable whether he knew it was done or not, and hence made him liable for the act of his servant. Accordingly Mr Justice Archibald, in the case of *Mullens* quoted, see L. R., ix., Q. B., pp. 295, 296, expressly points out that the appellant there had been properly held liable under a sub-section where 'knowingly' had been omitted, and that that must be the meaning of the Legislature in making a difference in the wording. And Lord Rutherford, in the *Advocate-General v. Grant*, xv., D. 983, sees no reason for exempting the master if he trusts his business to a servant who violates the Act under which the business is conducted, and within the sphere of his employment. It was the duty of Reid to sell the whisky; if that had not been her duty, then the master would not have been liable, as in *Regina v. Gilroys*, March 20, 1866, Macph., vol. iv., p. 656. She knew the parties not to be *bond fide* travellers; if she had sold to people whom she believed to be *bond fide* travellers, but ultimately proved not to be such, she would have got off. The case of *Linwood*, 14th May 1817, 19 F. C., 327, shows that if a master gave authority, and his instructions were not carried out, he is liable. If the law was, as Mr Kennedy put it, the statute would be entirely nugatory. In Macdonald's 'Criminal Law,' p. 275, the law is stated and a number of English cases given, and one under the revenue



laws, where the Court held that actual knowledge of the offence by the master was not necessary to a conviction.

1885.

No. 77.  
Greenhillv.  
Stirling.High Court,  
March 19.

Appeal.

KENNEDY, in reply.—In Stories' 'Justices' Manual,' 1884 ed., p. 390, the latest authorities on English law are given, and they are to the effect that the master is not criminally responsible for the act if done without his knowledge and authority.

At advising—

LORD YOUNG.—This is a prosecution under the Licensing Acts of a man who keeps an inn in Forfar, for contravening the conditions of his certificate under the statute, in so far as he 'did open his house for the sale of excisable liquors, and did permit or suffer drinking therein, or on the premises belonging thereto, or did sell or give out the same on Sunday.' The facts stated are generally, that the publican and his wife left the house on Sunday afternoon, leaving a girl Reid in charge. Reid seems to have acted as a waitress, and to have had some charge; and strict injunctions were given to her to admit and serve only *bond fide* travellers. The only other person in the house was the cook; and the publican, before leaving, gave some beer and whisky to Reid in case any *bond fide* travellers should come. None did come but two sweethearts of the girls, said to be Sunday-school teachers, and well known to them as not *bond fide* travellers, and to them Reid supplied two glasses out of the bottle of whisky, which was paid for by one of the men, and must have been so paid in order to supply the plain deficit in the bottle; for of course as the bottle was diminished by two glasses, it had to be handed back to the publican as if the glasses had been given to *bond fide* travellers; and it was so handed back to him on his return home. And the magistrate who states these facts, reports that Reid in supplying the whisky deliberately violated the orders given her. But the master is nevertheless convicted and fined; and the question submitted to us is, whether the whisky being

1885.

No. 77.  
Greenhill  
v.  
Stirling.

High Court,  
March 19.

Appeal.

supplied as I have just stated, in deliberate violation of the orders given, the master is liable in a contravention of his certificate. And without saying more, I am of opinion that the master was not guilty, and I propose that the conviction should be set aside. I have authority from the Lord Justice-Clerk, who heard the argument in this case, to say that he concurs in the proposed judgment.

LORD CRAIGHILL.—I also concur, and on the ground that Reid was not acting within the scope of her employment. She was not acting within her authority, but outwith it in permitting the men to enter, and was merely consulting her own convenience in treating them in the way she did.

The following was the Interlocutor :—

*‘Edinburgh, 19th March 1885.—Having considered this Case, and heard Counsel for the parties, Sustain the Appeal, Reverse the determination of the inferior judge, and decern : Find the Appellant entitled to expenses, which modify to five guineas ; for which, and one guinea as the dues of extract, decern against the respondent.’*

Agents for Appellant—MACRAE, FLETT & RENNIE, W.S.

Agents for the Respondent—GORDON, PRINGLE, DALLAS & Co., W.S.

Present,

LORDS YOUNG, CRAIGHILL, and M'LAREN.

GEORGE HAYDON, Appellant—*J. Comrie Thomson.*

AGAINST

JOHN FORD CORMACK, Respondent—*Lang.*

SALMON FISHING—STAKE NETS—WHITE FISHING BY STAKE NETS—STATUTE 31 AND 32 VIC., c. 123, SECS. 9 AND 15 (Salmon Fisheries (Scotland) Act, 1868)—TAKING SALMON DURING CLOSE TIME—SENTENCE—FINE AND IMPRISONMENT IMPOSED CUMULATIVELY.—A had leave from B, a fishery proprietor, to set a stake net in the Solway Firth to catch white fish. It was set for that purpose during the close time for salmon, and one morning early a salmon was found in it by a policeman before

A had gone to the net. Held that this did not constitute a 'taking' during close time in the sense of the Salmon Fisheries (Scotland) Act, 1868, inferring a contravention of the Act.

The Justices adjudged the accused to pay five shillings of penalty, with twenty shillings for the salmon found in the prisoner's net of farther penalty, with thirty shillings of expenses, and without any alternative also adjudged the accused to be imprisoned for the space of fourteen days upon a complaint charging a contravention of the Salmon Fisheries (Scotland) Act, 1868, by fishing for salmon by stake nets during close time. Opinion, per Lord Young, that this cumulative form of sentence was illegal and was a sufficient ground of itself for suspension.

THIS was an appeal on a Case stated under the Summary Prosecutions Appeals Act, at the instance of GEORGE HAYDON, fisherman, Sheartree Burn, Carlaveroch, Dumfriesshire, against a conviction and sentence pronounced by the Justices in the Justice of Peace Court at Dumfries upon a complaint under the Summary Jurisdiction Acts 1864 and 1881, at the instance of JOHN FORD CORMACK, Procurator-fiscal of Court.

1885.

No. 78.  
Haydonv.  
Cormack.High Court,  
March 19.

Appeal.

The Case set forth—

This is a cause raised by complaint under the Summary Jurisdiction (Scotland) Acts, charging the appellant, at the instance of the respondent, with a contravention of the Act of Parliament entituled 'The Salmon Fisheries (Scotland) Act, 1868,' 'in so far as on the 5th day of October 1884 years, or about that time, being during the annual close time in the district of the river Annan, in the Solway Firth, and at that part thereof in the parish of Ruthwell and county aforesaid, on or near Blackshaw Bank, in said parish of Ruthwell, and within the limits of said district, the said George Haydon did, by means of a stake net, or other description of net, take one or more salmon, whereby the said George Haydon is liable to a penalty not exceeding £5, and to a further penalty not exceeding £2, and, failing payment, to poinding and imprisonment for any period not exceeding six months.'

The cause was tried on 5th November 1884, when the accused pleaded not guilty.

The following were the facts proved in evidence:—

The annual close time of the district of the river Annan is from 10th September to 24th February, being fixed by bye-law, 21st August 1882, in terms of section 9 of 'The Salmon Fisheries (Scotland) Act, 1868.' Between the hours of one and two o'clock on the morning following the day libelled, about half an hour after

1885. the tide had ebbed from the place libelled, there was found by  
 No. 78. police constables, one salmon in, and taken by, a stake net belonging  
 Haydon to the appellant, fixed at the place libelled. The said net was  
 v. adapted for taking white fish, and also for taking salmon, and the  
 Cormack. appellant had a license from Lord Herries, who is a fishery pro-  
 High Court, prietor, to erect and use a stake net for the capture of flounders and  
 March 19. other white fish at that place.  
 Appeal.

The Justices, in respect of the evidence adduced, convicted him 'of the contravention charged, and therefore adjudged him to forfeit and pay the sum of five shillings of penalty, with the sum of twenty shillings for the fish so found of farther penalty, with the sum of thirty shillings of expenses, and, in respect it was inexpedient to issue a warrant of poinding and sale, adjudged him to be imprisoned in the prison of Maxwelltown for the space of fourteen days.' The appellant paid the penalties and expenses under protest.

The ground of appeal against the determination of the Justices was:—That the appellant had a license from Lord Herries, the owner of a fishery, to erect the stake net in question for the capture of white fish, that the net in question was legally in use for that purpose at the time of the alleged offence, and the appellant was not liable to conviction for the capture of the salmon found in his net, notwithstanding it was during the annual close time, in respect he was exercising a lawful right, and was lawfully authorised thereunto by a fishery proprietor.

The question of law for the opinion of the Court was :—

'Was the license of Lord Herries, a fishery proprietor under the Solway Act, to erect a net for the capture of white fish, available to protect the accused from the consequences of a salmon having been taken in his net during the annual close time?'

J. COMRIE THOMSON, for the appellant, contended.—The appellant has been improperly convicted. He had the fishery proprietor's leave to fish by stake net in the place where the net was found. He was therefore exercising his legal rights. It was a white-fish net, and was set to catch white fish. On the morning the salmon was found, the appellant had not been to the net, had not, in point of fact, found the salmon, which was found by a policeman. This is a much stronger case for the appellant than the case of *Neilson v. Fenton*, High

Court, 16th Nov. 1876, Couper, vol. iii., p. 353, which was of a similar character, under the Solway Act, 44, George III., chap. ccccl.; there the fishermen had actually taken the fish and had proceeded to carry them off. The appellant had never touched the fish, and he could do nothing to prevent it coming into the net. It was a purely accidental taking, and not a contravention of the statute. The act of 1868 does not, it is true, contain the word 'wilfully' which the Solway Act does, and also the act of 1844, under which the case of *Grant v. Wright*, High Court, 21st May 1876, Couper, vol. iii., p. 282, was decided; and there it was held that the taking must be intentional, which this was not. This is the first case, moreover, that has occurred during close time; the other cases referred to open time, and were brought to protect the salmon-fishery nets. The sentence of the Justices, moreover, was illegal on the face of it. The sentence should have been alternatively stated, whereas it is cumulative; imprisonment should have been awarded in the event only of non-payment of the penalty, &c. The proceedings should be quashed on that ground alone.

LANG, for the respondent.—The case of Neilson cited for the appellant, has no application. The act there says the taking must be wilfully. The present statute purposely omits this word with the intention of including such an act as is here complained of. The clause of the act applies to every person who takes or attempts to take salmon in close time. The facts were that the nets were the appellant's, were suited for taking salmon, and did so on this occasion. The license has little bearing, because it has been held that the public can fish for white fish with these nets so long as they do not interfere with salmon fishings. There is no point of law for the decision of the Court. Where the Justices have gone wrong in respect to the sentence, which should have been alternatively stated, the Court, by the Summary Prosecutions Act, 1875, sec. 3, sub-sec. 9,

1885.

No. 78.

Haydon

v.

Cormack.

High Court,  
March 19.

Appeal.

1885.

No. 78.  
Haydon  
v.  
Cormack.

High Court,  
March 19.

Appeal.

has power to order the case to be amended, and thereafter to pronounce judgment upon it.

LORD YOUNG.—This is a prosecution for contravening the Salmon Fisheries Act, 1868, section 15, sub-sec. 1 and the charge against the appellant is, that he did in a certain place take one or more salmon by means of stake or other net during the annual close time. The facts are, that the appellant is a white-fish fisherman, holding a license from Lord Herries, a proprietor of fishings, to use a stake net at a particular place for the purpose of taking white fish. We know that these stake nets are much akin to salmon stake nets; they are smaller and inferior to salmon stake nets, but have a strong family likeness. They are quite lawful for catching white fish, but must be used so as not to be destructive to the salmon fishing. There is a controversy, as we know, as to their fitness for taking salmon; but they do take them. They do not take them so well as the regular nets, as fish get out easily. Salmon may be taken, and have been, but the extent they are taken is a matter of controversy, and we have taken means to ascertain how far this goes. Now this net was set for taking white fish, but it might take salmon in the sense that a salmon might occasionally get in, and when in, might not easily get out; and on the occasion specified, half an hour after high water a salmon was found there by a policeman; and the question is whether that amounts to a contravention of the statute; and I must confess I think the conviction is not a satisfactory one. If the Justices had been of opinion that the appellant was fishing for salmon under cover of fishing for white fish, and that he had been caught in doing so, I would have been of a different opinion, but I see nothing in the case to lead us to that opinion; and taking the case boldly as I have stated the facts, that the owner of a net adapted for white fishing, and not well adapted for salmon fishing, but capable of taking salmon in the sense that a salmon might get in

and not get out again, and being found there by a policeman, I think the conviction should not stand. On the sentence which the magistrates pronounced, I think it right to say that it is not in my opinion legal. It imposes a fine and adjudges imprisonment. No doubt it was meant to be alternatively stated, but it is not so put. It is not under our notice, as this is a case for our opinion, but it would be a proper ground of suspension, if that had been the form in which the case had come to us. This is a full appeal, and the statute provides that we shall have the power; and, indeed, makes it our duty to review the whole procedure and do what we think right, and I think it would have been proper to set aside the judgment on this ground alone if there had been no other. I hope for the future that a decerniture for imprisonment will be inserted in the conviction only in case the fine shall not be paid. I am for sustaining the appeal, and allowing five guineas of expenses.

1885.

No. 78.  
Haydon  
v.

Cormack.

High Court,  
March 19.

Appeal.

LORD CRAIGHILL.—I am of the same opinion. I rather hesitate to interfere with the judgment of the magistrates, but for the reasons stated by Lord Young I have come to the same conclusion. I confess that every way I look at it, I am much surprised that it was not stated that the accused was fishing for salmon, instead of simply that he had taken a salmon. Looking to the law that has been founded on, and having regard to all the circumstances of the case which are now before us, I think it would involve the parties in hardship if we were to adopt the view of the magistrates.

LORD M'LAREN concurred.

The following was the Interlocutor:—

*‘Edinburgh, 19th March 1885.—Having considered this Case, and heard counsel for the parties, Reverse the determination of the Justices, and decern: Find the appellant entitled to expenses, which modify to five guineas; for which, and one guinea as the dues of extract, decern against the respondent John Ford Cormack.’*

Agent for Appellant—ROBERT BROATCH, L.A.

Agents for Respondent—SMITH & MASON, S.S.C.



Present,

LORDS YOUNG, CRAIGHILL, and M'LAREN.

THE SCHOOL BOARD OF THE PARISH OF NORTH UIST,  
Appellants—*Low*.

AGAINST

NORMAN MACDONALD, Respondent—*Absent*.

STATUTE 35 AND 36 VIC., c. 62 (Education (Scotland) Act, 1872), SECS. 70 AND 71—STATUTE 46 AND 47 VIC., c. 56 (Education (Scotland) Act 1883), SECS. 9 AND 14—ATTENDANCE ORDER—SUMMARY JURISDICTION ACT, 1881, SEC. 9.—A complaint alleging a contravention of the Education Acts, 1872-1883, and praying for an attendance order, was brought under the Summary Jurisdiction Act, 1881, and was signed neither by the complainer (the School Board) nor a duly-qualified law-agent, as section 9 requires, but by an officer appointed by the School Board to report defaulters to them.

Held that the complaint was properly initiated.

1885. THIS was an appeal at the instance of the SCHOOL  
No. 79. BOARD OF NORTH UIST, under the Summary Prosecutions  
School Appeals Act, against a judgment of the Sheriff-sub-  
Board of stitute of Inverness-shire at Lochmaddy (James Gray  
North Uist Webster, advocate), dismissing as incompetent a com-  
v. plaint brought under the Summary Jurisdiction Act,  
MacDonald. 1881, by the School Board of North Uist against  
High Court, NORMAN MACDONALD.  
March 19.  
Appeal.

The Case set forth that—

The School Board of North Uist brought a complaint on 10th January 1885, against Norman MacDonald, tailor, Mallaglate, in the school district of Duns Keller, alleging a contravention of the Education Acts, 1872-1883, in respect that he had without reasonable excuse failed to discharge the duty of providing efficient elementary education for his child Mary, and failed to secure her regular attendance at school after due warning, and praying that an attendance order under section 9 of the Education (Scotland) Act, 1883, might be pronounced against him. The School Board, by minute of 29th December 1884, authorised Angus MacAulay, compulsory officer, to make and sign all complaints under the Educational Acts against defaulters under said Acts in certain districts. The present complaint at the instance of the School Board is signed by him under that authority. He is not a

duly-qualified law-agent, and the Sheriff-substitute has dismissed the complaint.

By sections 70 and 71 of the Education (Scotland) Act of 1872, the School Board are directed, if necessary, to certify in writing the failure of a parent to educate his child, and 'on said certificate being transmitted to the Procurator-fiscal of the county or district of the county in which the parent resides, or other person appointed by the School Board, he shall prosecute,' &c.

The Board had by this Act no power to prosecute in their own name, but had power to delegate that duty to another, who prosecuted at his own instance and in his own name, his authority being the certificate of the Board.

By section 9 of the Education (Scotland) Act, 1883, it is enacted, that 'it shall be lawful for the School Board, after due warning to the parent of such child, to complain to a Court of summary jurisdiction,' &c., for the purpose of obtaining an attendance order under that Act; and section 10, 'Where an attendance order is not complied with without reasonable excuse, a Court of summary jurisdiction, on complaint made by the School Board, may, if it think fit, impose a penalty,' &c. Under this Act for the purpose of obtaining or enforcing an attendance order the complaint is at the instance of the School Board, and not of a person appointed by them.

Section 14 of the Education (Scotland) Act, 1883, enacts, that any prosecution for the purpose of obtaining or enforcing an attendance order the prosecution shall be under the provisions of the Summary Jurisdiction Acts, and that 'in any such prosecution any person appointed by the School Board, or any inspector or sub-inspector of factories, workshops, or mines, may appear before the court and conduct the prosecution.'

Section 9 of the Summary Jurisdiction Act, 1881, enacts, that every complaint at the instance of a private prosecutor or complainer under the Summary Jurisdiction Acts may be signed either by such private prosecutor or complainer, or by a duly-qualified law-agent on his behalf, and such law-agent may, in the absence of the prosecutor or complainer, appear in Court and conduct the prosecution on his behalf.'

The Sheriff-substitute was of opinion that the School Board is a private prosecutor or complainer within the meaning of said Act, and though the words of section 14 of the Education (Scotland) Act, 1883, seem to have done away with the necessity of the appearance of a Court of a duly-qualified law-agent to conduct the prosecution, it has left untouched the provision that requires a complaint signed by complainer or duly-qualified law-agent to initiate the proceedings, and that the want of this is fatal to the complaint.

1885.

No. 79.  
School  
Board of  
North Uist  
v.  
MacDonald.

High Court,  
March 19.

Appeal.

1885.

No. 79.  
School  
Board of  
North Uist  
v.  
MacDonald.

High Court,  
March 19.

Appeal.

The questions of law for the decision of the Court of Justiciary were :—

‘(1) Is the School Board a private prosecutor under the meaning of section 9 of the Summary Jurisdiction Act, 1881?’

‘(2) Does the Education (Scotland) Act, 1883, give the complainers power to authorise a person who is not a duly-qualified law-agent to sign the present complaint on their behalf?’

No appearance was made for the respondent, and the Court held that the complaint was properly initiated—Lord Young remarking that obvious convenience required that the officer’s signature should be sufficient. If there had been any rule of law against that, the Court would have given effect to it. But there being none, and the convenience of the course pursued being all the other way, the Court think the complaint a good one, and that the Sheriff ought therefore to have proceeded.

The following was the Interlocutor :—

‘*Edinburgh, 19th March 1885.*—Having considered this Case and heard Counsel for the appellant, there being no appearance for the respondent, Answer the second question in the Case in the affirmative, Recal the Interlocutor complained of, and remit to the Sheriff-substitute.’

Agent for the Appellants—MESSRS TODS, MURRAY & JAMIESON, W.S.

Present,

LORDS YOUNG, CRAIGHILL, and M’LAREN.

ALEXANDER M’PETRIE, Appellant—*Baxter*.

AGAINST

GEORGE CADENHEAD, Respondent—*J. Comrie Thomson*.

PUBLIC HOUSE—GIVING SPIRITS GRATUITOUSLY AS HOSPITALITY—STATUTE 25 AND 26 VIC., CAP. 35, SCHEDULE A., No. 3 (Public Houses Acts Amendment (Scotland) Act, 1862)—GROCER’S CERTIFICATE.—The holder of a grocer’s certificate,—which prohibits the giving of, or trafficking in, spirits to be drunk or consumed on the licensed premises,—gave gratuitously and as hospitality to a friend,

a glass of ale at 10 P.M. of the day libelled, which was consumed on the premises. Held that this did not amount to a giving to be consumed on the premises in the sense of the Act, and a conviction for breach of the certificate quashed accordingly.

THIS was an appeal under the Summary Prosecutions Appeals Act, at the instance of ALEXANDER M'PETRIE, grocer and spirit dealer, residing in Garvock Street, Aberdeen, against a conviction and sentence pronounced by one of the Magistrates of Aberdeen, upon a complaint under the Summary Jurisdiction Acts, 1864 and 1881, at the instance of GEORGE CADENHEAD, Procurator-fiscal of Court.

1885.

No. 80.

M'Petrie

v.

Cadenhead.

High Court,  
March 19.

Appeal.

In the Case it was set forth that—

The appellant was charged with having been guilty of an offence within the meaning of the Acts for the 'Regulation of Public Houses in Scotland,'—viz., 9th Geo. IV., cap. 58; 16th and 17th Vic., cap. 67; and 25th and 26th Vic., cap. 35; or one or more of them, actor or art and part;—in so far as on the first day of November 1884, or about that time, the said Alexander M'Petrie, who holds a certificate in the form of No. 3 Schedule A of the Act last above-mentioned, for premises in Garvock Street aforesaid, did within his said licensed premises, traffic in or give excisable liquors to be drunk or consumed on his said premises, to James Gabriel, gate-keeper, residing in Saint Clement Street, of Aberdeen; or to some other person or persons to the complainer unknown.

The appellant having appeared and pled not guilty, and no questions of relevancy having been raised, evidence was led in support of the complaint, and also in exculpation.

It was proved that about 10 P.M. on the day in question, two detective police-officers went to the appellant's shop, and found there the appellant, his wife, and two men. One of the latter, James Gabriel, named in complaint, had a tumbler containing ale in his hands, and, on recognising the officers, he tried to conceal the tumbler behind his back. The appellant, on seeing the police-officers, hurriedly retired towards the back of the shop, and on being charged by them with giving drink to be consumed on the premises, he admitted the same, and requested that nothing might be said about it. It was also proved that the appellant's dwelling-house, though situated in the same street as his shop, was quite unconnected therewith. The licensed premises occupied by the appellant consisted solely of the shop where he carried on his business as a licensed grocer.

1885.  
 No. 80.  
 M'Petrie  
 v.  
 Cadenhead.  
 High Court,  
 March 19.  
 Appeal.

By the exculpatory evidence it was proved that Gabriel was an intimate friend and a customer of the appellant, and that about 9.30 P.M., on the day in question, he went to the appellant's shop to purchase groceries and sundry goods. Before he made any purchases, or stated his purpose in calling, the appellant asked him if he would take a glass of ale, and he accepted the offer. It was proved that Gabriel supposed and believed that the ale was given him gratuitously, and as a mark of friendship and hospitality, and that he did not pay, and was not asked to pay for it at any time; that Gabriel did not purchase any goods, but left the shop after the officers entered; that the police-officers did not see any money pass between the appellant and the witness Gabriel, and did not enquire whether the ale was given as a treat or not.

Upon that evidence the appellant was convicted of the offence charged, and a fine was imposed, the magistrate holding that a licensed grocer is, by the terms of his certificate, debarred from using his licensed premises in his private capacity, for the purpose of giving gratuitously, by way of hospitality, excisable liquors to be consumed on the premises to his customers, even though they be intimate friends. As it was a first offence, the magistrate restricted the penalty to £1, 5s., with £1, 8s. 6d. of expenses.

The question of law for the opinion of the High Court of Justiciary was:—

‘Whether a licensed grocer is, by the terms of his certificate, debarred from using his licensed premises in his private capacity, for the purpose of giving gratuitously, by way of hospitality, excisable liquors to be consumed on the premises to his customers, even though intimate friends?’

BAXTER, for the appellant.—The case is ruled by *Smith v. Stirling*, High Court, March 6, 1878, Couper, vol. iv., p. 13, and *Kay v. Gemmell*, *supra*, p. 535. The magistrate has found that the liquor was given gratuitously by way of hospitality, and that was now not a contravention of the certificate, even when the liquor was given in part of the licensed premises.

J. COMRIE THOMSON, for the respondent.—The present case is distinguishable from both the cases founded on by the appellant. In the case of *Smith v. Stirling* the public-house keeper's house was used for the purpose of entertaining his friends, although it was part of the

licensed premises ; and in *Kay v. Gemmell* the kitchen of the establishment was used, also part of the licensed premises. These were two quite different cases, as the publican could not entertain his friends in his own house without entertaining them in the licensed premises. Here the shop itself was used ; the dwelling-house was no part of the licensed premises, was indeed separate from them, and in another part of the street ; and to permit this sort of 'giving' in such a place was opening a wide door to improper dealing.

LORD YOUNG.—This question has been argued frequently, and in a variety of cases. It was first raised in the case of a public-house, the publican living in the house ; and the question was whether the publican who gives a party to his friends after eleven o'clock in the premises licensed for the sale of liquor, part of which he used as a dwelling-house, was contravening his certificate ? We held he was not ; he was acting merely in his private capacity, and like any other person giving a party to his friends. And it does not matter if the entertainment was not in the room usually used by the family so long as there is no doubt that he was dispensing hospitality, and he might take the larger room usually appropriated to the public so long as his *bonâ fides* was undoubted. Of course it is very important that the magistrate should be satisfied on the facts as to the *bonâ fide* nature of the proceeding, and these facts are important as affecting their decision. All the arguments that we are accustomed to hear as to the abuse of such a manner of entertaining were urged upon us, as that publicans would put forward all their customers as their friends, and so evade the statute. The answer which was made, and which I hope it will be unnecessary to repeat, is, that it is the duty of those enforcing the law to find out the truth in each case, and see that there is no evasion of the statute. The question arose again in the grocer's case, where a glass of beer was given to a friend in a room behind the shop, the room

1885.

No. 80.  
M'Petrie  
v.

Cadenhead.

High Court,  
March 19.

Appeal.

1885.  
 No. 80.  
 M'Petrie  
 v.  
 Cadenhead.  
 High Court,  
 March 19.  
 Appeal.

being the kitchen of the house and part of the licensed premises. We were told that the case of the publican could not apply, for the grocer could not give a party although the publican might. But we held that the publican's case did apply, and Lord Craighill, who seriously doubted in the public-house case, concurred in the view of the majority in thinking that the matter was settled by decisions, and that it did not matter that the drink was given in licensed premises so long as it was by way of hospitality and not in the exercise of trade. Then we have this case, in which the beer is given in the shop itself; and again we are told there is a danger of fraud. There is no doubt that it is not a case of dealing, but a case of giving by way of hospitality a glass of beer in the licensed premises, and there is this difference from the other cases: that there is no house attached to or forming part of the licensed premises belonging to this grocer. But we have decided that the fact of the premises being licensed does not settle the question whether there has been a contravention or not. The moment the fact is settled that the giving is hospitality, and not dealing, it does not signify where it was given. I therefore cannot assent to the ground of the magistrate's conviction,—that 'a licensed grocer is by the terms of his certificate debarred from using his licensed premises in his private capacity for the purpose of giving gratuitously by way of hospitality excisable liquors to be consumed on the premises.' We have negatived this view already, and I am for answering the question in the negative and sustaining the appeal.

LORD CRAIGHILL.—I concur. I think that the facts in this case are covered by previous cases. The cases are not absolutely identical, because the dwelling-house where the liquor was given by way of hospitality and consumed was part of the licensed premises, in the cases of *Smith v. Stirling* and *Kay v. Gemmell*, and the ground of judgment in these cases was that a man was



not to be debarred from doing on his licensed premises that which any other man might do in his private house. Here there is no dwelling-house but a back shop. We have, however, decided that hospitality in licensed premises is not to be taken as a contravention, and a back shop may as well be used for such a purpose as any other part of the licensed premises.

1885.  
 No. 80.  
 M'Petrie  
 v.  
 Cadenhead.  
 High Court,  
 March 19.  
 Appeal.

LORD M'LAREN.—I concur. When the decision in *Kay v. Gemmell* is examined, there is seen to be no door for that evasion of which we have heard so much; because the judgment was expressly guarded by expressions to the effect that if the publican gives by way of dealing under the cover of hospitality during prohibited hours, the magistrate must put a stop to this. The Court considered that in that case there was no attempt at evasion. The distinction here is that the place where the liquor was given was the licensed shop itself and not a part of the premises usually appropriated for another purpose. The condition of this certificate is that the grocer shall not 'traffick in or give spirits,' &c., to be drunk or consumed on the premises. No doubt if the magistrate thinks that the circumstances show that the liquor was given in the course of trade, he may hold that there has been a contravention of the certificate, which prohibits trafficking or giving spirits to be consumed on the premises. It has been decided that the giving must not be a giving by way of dealing in any way; nor a giving under the cover of hospitality. If a grocer was to give a dram or drams to a customer to promote his trade, that would be a contravention. But that was not the case here. Every circumstance is expressly negatived which would suggest dealing. The magistrate thought it was hospitality, and he so finds, and I am of opinion he should not have convicted the appellant, and that the conviction, therefore, should be quashed.

The following was the Interlocutor:—

'*Edinburgh, 19th March 1884.*—Having considered this Case, and heard Counsel for the parties, Answer

1885. the question in the Case in the negative: Reverse the  
 No. 80. determination of the inferior Judge, and decern: Find  
 M'Petrie the appellant entitled to expenses, which modify to  
 v. five guineas; for which, and one guinea as the dues of  
 Cadenhead. extract, decern against the respondent.'

High Court,  
 March 19.

Appeal.

Agents for the Appellant—HENRY & SCOTT, S.S.C.

Agent for the Respondent—D. HILL MURRAY, Solicitor.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and M'LAREN.

ANDREW GEMMELL, Appellant—*Guthrie*.

AGAINST

ROBERT WATSON HADDEN and ROBERT RICHARDSON, Respondents

STATUTE 31 AND 32 VIC., c. 123 (Salmon Fisheries (Scotland) Act, 1868), SEC. 30—INSTANCE.—A Procurator-fiscal of the Justice of Peace Court brought a complaint charging a contravention of section 18 of the Salmon Fisheries (Scotland) Act, 1868, in his name as 'Procurator-fiscal of Court.' The Justices dismissed the complaint, in respect he was not a 'clerk of a District Board,' nor 'any other person' in the sense of section 30 of the Act. Held, reversing the determination of the Justices, that the instance was good.

No. 81.  
 Gemmell  
 v.  
 Hadden.

High Court,  
 July 10.

Appeal.

THIS was an appeal on a Case stated at the instance of ANDREW GEMMELL, Procurator-fiscal of the Justice of the Peace Court, under the Summary Prosecutions Appeals Act, against a judgment of the Justices of the Peace at Haddington, upon a complaint under the Summary Jurisdiction Acts, 1864 and 1881, at his, the appellant's, instance, against the respondents, ROBERT WATSON HADDEN, clerk, West Haugh, Haddington, and ROBERT RICHARDSON, clerk, 51 High Street, Haddington, charging them with a contravention of the 18th section of the Salmon Fisheries (Scotland) Act, 1868.

The Case set forth that—

The respondents appeared at the bar, and the complaint was read over to them. Before they were called upon to plead by the Justice

the chair, the other Justice raised the point of the competency of bringing the respondents for the contravention charged in the Justice Peace Court. He was referred to the 30th section of the Act, which provides—‘All offences under this Act may be prosecuted, and all penalties incurred under this Act may be recovered before any Sheriff, or any two or more Justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any District Board, or of any other person.’ He then raised the other point of whether it was competent for the appellant, in his official capacity as ‘Procurator-fiscal of Court,’ to prosecute under the Act. The Justices held that it was incompetent for the Justice of Peace Fiscal to prosecute in his official capacity, and that the expression in the Act, ‘any other person,’ meant a common complainer, and that the Procurator-fiscal was not ‘any other person’ within the meaning of the Act. They also refused the request of the appellant to be allowed to amend the complaint by deleting the words ‘Procurator-fiscal of Court,’ and putting in the words, ‘Solicitor, Haddington,’ and dismissed the complaint.

1885.

No. 81.

Gemmell

v.  
Hadden.

High Court,  
July 10.

Appeal.

The questions of law for the opinion of the High Court of Justiciary were :—

*First.* Whether the instance in the complaint as stated was good?

*Second.* Whether the amendment craved by the appellant was admissible?

GUTHRIE, for the appellant, submitted that the Justices had erred.

There was no appearance for the respondents, and the court sustained the appeal,—the Lord Justice-Clerk remarking that he had no doubt there had been error in law on the part of the Justices, as the Procurator-fiscal was certainly entitled to prosecute, as any one else could.

The following was the Interlocutor :—

‘*Edinburgh, 10th July 1885.*—Having considered this Case, and heard Counsel for the Appellant, there being no appearance for the Respondents, Sustain the appeal: Remit to the Justices to proceed in terms of law, and decern.’

Agents for the Appellant—PATERSON, CAMERON & Co., S.S.C.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and M'LAUREY.

ROBERT BRYCE, Appellant—*Brand*.

AGAINST

JOHN GUTHRIE SPENCE, Respondent—*Strachan*.

**APPEAL UNDER SMALL-DEBT ACT—STATUTE 7 WM. IV. and 1 VIC., c. 41, SEC. 31 (Small-Debt Act, 1837)—REMIT TO SHERIFF FOR REHEARING.**—A, a tailor, sued B in the Small-Debt Court for the price of a suit of clothes. B pleaded that he had not dealt with A, but with C, whose name was on the door of A's shop, that circulars had been issued by C from the shop in his own name, and that he (B) in giving his order to C, had done so to extinguish a counter claim which he had against him. A produced a minute of agreement between himself and C to show that the latter was his shopman, and that he (A) was the principal. The Sheriff decerned against B, who appealed. The Court sustained the appeal, and remitted to the Sheriff for rehearing, and proof, if necessary.

1885. JOHN GUTHRIE SPENCE, tailor and clothier, 46  
 No. 82. Frederick Street, Edinburgh, sued ROBERT BRYCE,  
 Bryce spirit merchant, Ratho, before the Small-Debt Court,  
 v. Spence. Edinburgh (Sheriff Hamilton), for £5, 16s. 9d. for a  
 High Court, suit of clothes. Bryce answered that the goods libelled  
 July 10. had been ordered and received from Edmund Mann,  
 Appeal. tailor and clothier, sometime a partner in the firm of  
 Mann & Son, tailors and clothiers, 39 Frederick Street,  
 and afterwards carrying on business as tailor and  
 clothier at 46 Frederick Street, and that the goods were  
 so furnished by Mann for the purpose of extinguishing  
*pro tanto* a claim of £14, 12s. 8d. which Mann was  
 admittedly then due and resting-owing to him (Bryce),  
 and payment of which had been demanded, and that he  
 (Bryce) knew nothing of the pursuer till he sent him an  
 account for the goods.

It was proved that Mann's name was on a brass door-

plate on each side of the door at 46 Frederick Street, and appeared in the Post Office Directory as at that address. And that circulars soliciting custom had been sent from that address to customers in Mann's name.

1885.

No. 82.  
Bryce  
v.  
Spence.

The pursuer Spence produced an agreement between Mann and himself, dated more than two years prior to the transactions in question, which proceeded on the narrative :—‘The party of the second part [Mann] being desirous to retain the connection of the late firm of Mann & Son, tailors and clothiers, 39 Frederick Street, Edinburgh, of which he was lately a partner : And the party of the first part [Spence, the pursuer] being desirous to assist him in so doing, they have agreed to enter into these presents as follows.’

High Court,  
July 10.

Appeal.

‘*Third.*—The said Edmund Mann binds and obliges himself to introduce into the shop (No. 46 Frederick Street, Edinburgh) of the said John Guthrie Spence all the business he can, and such business shall be kept separate and distinct from the business of the said John Guthrie Spence. The said Edmund Mann and his heirs and creditors shall have no concern whatever with the business of the said John Guthrie Spence, but the said Edmund Mann shall devote his whole time, attention, and skill to the promotion and advancement, not only of the business introduced by him as aforesaid, but also to the business of the said John Guthrie Spence ; and the said John Guthrie Spence shall advance and promote the business to be so introduced by the said Edmund Mann, so far as it does not interfere with the business presently carried on by him ; and the said John Guthrie Spence shall supply such materials and work as he may consider necessary to carry on the business of the said Edmund Mann.’ No further evidence was led.

The Sheriff decerned in favour of the pursuer, and the defender (Bryce) took an appeal to the High Court, as coming in place of the Circuit Court, on the ground

1885. that no contract having been entered into, and no trans-  
 No. 82. action having taken place between him, the appellant,  
 Bryce v. and Spence, the pursuer and respondent, it was incom-  
 Spence. petent for the Sheriff-substitute to find him liable.  
 High Court, He further pleaded, as the 31st section of the Act 1  
 July 10. Vic., c. 41,<sup>1</sup> provides that this Court may remit the  
 Appeal. cause to the Sheriff for 'rehearing generally,' and as  
 there has been a miscarriage of justice and incompetent  
 procedure, this Court ought to sustain the appeal, and  
 remit the cause to the Sheriff, with instructions to re-  
 hear the same, and dispose thereof as may be just.

The appellant was heard in support of these pleas.

The respondent replied.—The Sheriff had all these considerations before him; and even if he has gone wrong, there is nothing here that can be included within the term incompetency. If the appeal be sustained, there is nothing to prevent an appeal being sustained in every small debt case.

The LORD JUSTICE-CLERK.—We have found this case not a little complicated and troublesome. It may be, and I do not intend to express any opinion on that question, that the whole procedure was regular. The question seems to be whether former transactions between Mann and Bryce can be set off against subsequent transactions with Spence avowedly acting with the view of keeping Mann's business together. That question comes

---

<sup>1</sup> Statute 7 Will. IV. and 1 Vic., cap. 41, section 31, after providing for an appeal to the next Circuit Court, or where there are no Circuit Court, to the High Court of Justiciary, provides:—  
 'Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from being done, or incompetency, including defect of jurisdiction of the Sheriff; provided also that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff, with instructions, or for rehearing generally,' &c.

ry narrow issue whether the customer thought  
d reason that he was dealing with his old  
id that the new debt might be set off against  
one. In sending the case back for rehearing,  
roof if required, we express no opinion on that

1885.

No. 82.

Bryce

v.

Spence.

High Court,  
July 10.

Appeal.

YOUNG.—What evidence will prove a contract  
Spence and Bryce, or between Bryce and Mann,  
for us to consider. Spence says Bryce made a  
with him ; Bryce says he did not, and that the  
he made was with Mann, who was his debtor

That is a matter for evidence. The agree-  
re is a very singular one, and, *prima facie*, I  
y that it was intended to put customers in the  
of thinking they were dealing with Mann,  
they were really dealing with Spence. That is  
d by the terms of the circular, which puts  
Mann as the person with whom contracts were  
de. Now, if it turns out that in fact the con-  
s made with Mann, then there is a good case  
ensation, and so I agree that this is a case for

M'LAREN.—I agree. The question is whether  
alt with Mann as an agent or as a principal.  
rdinary case, of course, the customer is under-  
be dealing with the master, and it could not be  
his hands that he was dealing with the shop-  
ut the peculiarity here is, that Mann, who is  
e merely a shopman, had his name on the brass  
the door. That is certainly a circumstance  
consideration of the Sheriff-substitute. If the  
was made with Mann as principal, no private  
at between him and Spence could prevent the  
e to Mann being compensated. These are my  
the circumstances, which I agree in thinking  
further inquiry.

Following was the Interlocutor :—

burgh, 10th July 1885.—Having considered this



1885. Appeal and heard Counsel for the parties, Remit to the  
 No. 82. Sheriff to rehear the Cause, and, if necessary, to take  
 Bryce proof thereanent, and proceed as may be just, with  
 v. power to the Sheriff to dispose of the expenses in this  
 Spence. Appeal along with the other expenses in the Cause, and  
 High Court, decern.'  
 July 10.  
 Appeal.

Agent for the Appellant—PETER DOUGLAS, S.S.C.

Agent for the Respondent—DAVID BARCLAY, Solicitor.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and M'LAREN.

WILLIAM NICHOLSON, Appellant—*Watt*.

AGAINST

WILLIAM DAVID YOOLE, Respondent—*Sol. Gen. (J. P. B. Robertson)*—*M'Kechnie, A.-D.*

STATUTE 46 AND 47 VIC., c. 22, SEC. 11 (Sea Fisheries Act, 1883)  
 —INSTANCE.—A Procurator-fiscal may prosecute in the Sheriff-Court in a complaint charging an offence against the Sea Fisheries Act, 1883.

83. This was an appeal upon a Case stated under the  
 Nicholson Summary Prosecutions Appeals Act, at the instance of  
 v. WILLIAM NICHOLSON, captain of the steam trawler  
 Yoole. *Deerhound*, and residing at Leith, against a conviction  
 High Court, obtained before the Sheriff of Fife (James Arthur Crichton, advocate), upon a complaint under the Summary  
 July 10. Jurisdiction Acts, 1864 and 1881, at the instance of  
 Appeal. WILLIAM DAVID YOOLE, Procurator-fiscal of Court, charging the appellant with a contravention of the Sea Fisheries Act.

The Case set forth—

That the appellant, on or about 16th March 1885, and in or near that part of the Firth of Forth which lies between the Isle of May and three miles to the south-west of the Isle of May, all in the county of Fife, contravened article 19th of the first schedule of

Act 46 and 47 Vic., cap. 22 (Sea Fisheries Act, 1883), by bringing, or causing his said vessel to be steered across the lines of certain long-line fishermen, whereby their lines were damaged.

At the trial of the cause it was objected, on the part of the appellant, that as sub-section 1 of section 11 of said Statute enacted that 'the provisions of this Act, and of any order in Council under this Act, or under the sections of the Sea Fisheries Act, 1868, amended by this Act, shall be enforced by the sea-fishery officers, whether British or foreign,' the complaint, at the instance of the Appellate Procurator-fiscal of Fifeshire, was incompetent, in respect that he was admittedly not a British or foreign sea-fishery officer. This objection was repelled.

The appellant pleaded not guilty.

It was proved that the appellant had been guilty of the contravention libelled, and the Sheriff adjudged him to forfeit and pay to the complainer the sum of five pounds of modified penalty, and in default of immediate payment thereof, decerned and adjudged him to be imprisoned for thirty days from the date of his imprisonment, unless the said sum should be sooner paid.

The question of law for the opinion of the High Court of Justiciary was :—

Was the Procurator-fiscal entitled to prosecute the complaint in question ?

WATT, for the appellant.—The Procurator-fiscal is not a proper prosecutor. By section 11 of the Sea Fisheries Act, 1863, the action must be brought by a sea-fishery officer ; which the Procurator-fiscal is not. The Act intended the prosecution to be by a fishery officer on account of his special knowledge of and connection with the industry. This principle regulates prosecutions under the Customs Consolidation Act, 39 and 40 Vic., c. 36. By section 255 of that Act, prosecution is directed to be by the Lord Advocate, or some other officer of the Crown. Had the instruction of the Legislature been to allow any person to prosecute, they would have expressly permitted it as under the Salmon Fisheries (Scotland) Act, 31 and 32 Vic., c. 123, sec. 30, where, after certain persons are named as prosecutors, the additional provision is made that the prosecution may be by any other person.' No such provision is in the Sea

1885.

No. 83.  
Nicholsonv.  
Yoole.High Court,  
July 10.

Appeal.

1885. Fisheries Act. The appeal ought therefore to be sustained.

No. 88.  
Nicholson  
v.  
Yoola.

The SOLICITOR-GENERAL (Robertson) and M'KECHNIE were not called on.

High Court,  
July 10.

Appeal.

The LORD JUSTICE - CLERK. — I am satisfied that the Sheriff has done right in sustaining the instance of the Procurator-fiscal, and I think the propriety of his decision has not been affected by the clause of the Sea Fisheries Act quoted to us. That clause provides that a sea-fishery officer, either British or foreign, is to enforce the provisions of the Act. I do not think it means that this is to be done only by a sea-fishery officer, or that the instance must be in his name ; and should any fishery officer, including the officer of a foreign government, choose to employ a Procurator-fiscal, he is entitled to do so, and I may say, might require his assistance in the matter. The Sea Fisheries Act was passed in consequence of an important convention for the protection of rights of great importance, which we know are regarded with considerable interest and attention by the Great Powers of Europe. But that has, in my opinion, no effect in the question of the instance of the Procurator-fiscal when before his own Court. This action was brought in the proper Court, and I am of opinion that when a Court is appointed by a statute to carry out its provisions, that implies that the usual procedure of that Court is to be adopted, unless the contrary is clearly provided. It is part of our judicial system that the Procurator-fiscal should prosecute in the inferior Court, and he is the proper person in the public interest to do so.

LORDS YOUNG and M'LAREN concurred.

The following was the Interlocutor :—

'*Edinburgh, 10th July 1885.*—Having considered this Case, and heard Counsel for the parties, Dismiss the appeal : Affirm the determination of the inferior Judge, and decern.'

Agents for the Appellant—GUNN & TODD, S.S.C.

CROWN AGENT.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and M'LAREN.

GEORGE PYPER, Complainer—*Sulvesen*.

AGAINST

WILLIAM WALKER, Respondent—*Brand*.

ADJOURNMENT OF DIET—PROCEDURE—STATUTE 27 AND 28 VIC., c. 53, SECS. 6 AND 11 (Summary Procedure Act, 1864)—IRREGULARITY IN PROCEEDINGS.—A person was arrested at seven o'clock at night, kept in jail all night, and placed at the bar of the Police Court at ten o'clock the following morning, when he was charged with the crime of theft. No warrant had been made out for his apprehension or detention, or for the citation of witnesses. About an hour previous to the trial he was asked if he had any witnesses to call, and he mentioned five, who were cited. At ten o'clock he was asked if he 'was ready to go on,' and answered yes. He pleaded not guilty, and also an *alibi*. Two of his witnesses, owing to the short notice, did not appear, and he was convicted.

Held that it was the duty of the magistrate on a complaint under the Summary Jurisdiction Acts, charging the crime of theft, to inform the accused of his right to an adjournment for forty-eight hours, especially if no complaint had been previously served on him; and the sentence suspended on the ground that the proceedings were too rapid for the protection of the interest of the accused, and to render the conviction safe.

THIS was a Bill of Suspension, presented by GEORGE PYPER, a mason, residing in Paisley, of a conviction and sentence pronounced in the Police Court of Paisley, on a complaint under the Summary Jurisdiction Acts, 1864 and 1881, at the instance of WILLIAM WALKER, Procurator-fiscal of the Burgh, which charged the suspender with the theft of twenty-five yards of wincey cloth from a shop in Paisley on the 19th of January 1885. He was apprehended at seven o'clock in the evening of that day, and kept in prison till next morning, without any complaint or charge being written out

1885.  
No. 84.  
Pyper  
v.  
Walker.  
High Court,  
July 10.  
Suspension.

1885. or read over to him, and without any warrant having  
 No. 84. been granted. At eight o'clock next morning he was  
 Pyper asked, while in prison, whether he wanted any witness  
 v. cited, and he named five, who were cited. And two  
 Walker. hours afterwards, viz., 10 A.M., he was placed at the bar  
 High Court, of the Police Court, and a complaint under the Summary  
 July 10. Jurisdiction Act, charging him with the above theft, was  
 Suspension. read over to him, and he was asked if he 'was ready to  
 go on,' and, as he made no objection, his trial was pro-  
 ceeded with. He pleaded not guilty. This was the  
 first and only formal intimation to him of the charge  
 upon which he was apprehended, and was the first time  
 he had ever been charged with any crime. The com-  
 plaint was prepared and signed, together with the  
 warrant to apprehend, and for the citation of witnesses,  
 while the suspender was at the bar, or at earliest a few  
 minutes before he was placed there. The magistrate  
 having immediately thereafter heard witnesses on both  
 sides—those for the suspender having been cited before  
 any warrant had been granted—the suspender was con-  
 victed and sentenced to fourteen days' imprisonment.  
 During his detention in prison before trial he was, he  
 averred, twice prevented from seeing his wife, and had  
 no opportunity afforded to him of obtaining the assis-  
 tance of a law agent, and was thus unable to prepare  
 his defence. In consequence also of the short notice  
 given to the exculpatory witnesses, two of them could  
 not attend, and it was averred that if they had been  
 examined they would have established the suspender's  
 innocence, and that he could not have been at the place  
 at the time libelled. The suspender was not represented  
 by any law agent.

In the Bill the suspender pleaded—1. Proper and  
 sufficient intimation of the charge against the complainer  
 not having been made to him, and no copy of the com-  
 plaint having been served upon or communicated to him  
 prior to the trial, the whole proceedings are incompetent  
 and illegal. 2. The complainer having been illegally

and oppressively tried on the occasion of his being first brought before a magistrate, and without any adjournment, the conviction complained of is incompetent and illegal. 3. No sufficient opportunity having been given for the citation of exculpatory witnesses, and no warrant having been granted for citing them at a sufficient interval before the trial, the conviction complained of is illegal and oppressive. 4. The whole proceedings having been hasty and irregular, and the complainer not having been offered any adjournment, or informed of his right to require the same, he is entitled to suspension and a new trial.

1885.

No. 84.

Pyper

v.

Walker.

High Court,  
July 10.

Suspension.

SALVESEN, for the suspender, contended.—This was a serious charge. The complainer had never been charged before, and bore an excellent character. The treatment he received was both oppressive and illegal. He was arrested, kept in jail, and placed at the bar without any warrant having been made out against him. He was refused the means of preparing his defence, by the authorities preventing him meeting his wife and a law agent. Owing to the short time allowed for summoning his witnesses—about two hours—two were unable to appear who would have cleared him from the charge. The witnesses who did appear were cited without any warrant. The trial ought not, either in terms of section 18 of the General Police and Improvement Act, 1862, or of section 6 or 11 of the Summary Procedure Act of 1864,<sup>1</sup> and schedule D annexed thereto, to have pro-

<sup>1</sup> Statute 27 and 28 Vic., c. 53 (The Summary Procedure (Scotland) Act, 1864).

Section 6.—‘On such complaint being laid before the Court, it shall be lawful for the Court to grant warrant to cite the respondent by delivering a copy of the complaint with warrant of citation to him personally, or . . . to appear before the Court on induciae of not less than forty-eight hours or (where apprehension is competent) to grant a warrant for the apprehension and interim detention of the respondent . . . and it shall be lawful to annex to such warrant . . . of apprehension a warrant to cite witnesses and havers for both parties. . . .’

1885.      ceeded, especially as it was a first offence. The magis-  
 No. 84.      trate was guilty of a failure of duty in omitting to  
 Pyper      inform the prisoner that he was entitled to an adjourn-  
 v.          ment under section 11 of the Summary Procedure Act  
 Walker.      of 1864,<sup>2</sup> of forty-eight hours.

High Court,  
 July 10.

Suspension.

BRAND.—The accused was ready. He was asked if he was ready, and he answered, yes. He was not told specially of his right to an adjournment, but this was implied in asking him if he was ready. The proceedings were quite regular under the Summary Jurisdiction Acts.

BY THE COURT.—Would it not have been better, seeing that it was a first offence, and that the defence was an *alibi*, that the case should have been adjourned.

BRAND.—The complainer had had opportunity to prepare his defence, and had seen an agent. As to his apprehension, he was properly apprehended under the Lindsay Act. Paisley is neither a Royal nor a Parliamentary burgh, and has adopted the Lindsay Act, and the complainer was quite regularly dealt with under that Act.

THE LORD-JUSTICE CLERK.—My Lords, it is always a question of delicacy and difficulty when we are asked to interfere with the sentence of a magistrate competently pronounced, and in the general case it is undesirable that we should. If we had the means to enable us to take the evidence of these two witnesses, it would be desirable that we should do so, but that is never done in cases of crime where a sentence has been pronounced; we cannot re-try the case, and any attempt to do so would lead to confusion. We have to consider only whether the proceedings have been regular; and I am of

---

<sup>2</sup> Section 11.—‘ Any respondent brought before the Court by a warrant of apprehension under the authority of this Act, shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period of not less than forty-eight hours. . . . ’



opinion that they were not regular, in respect that they were too rapid to allow of proper regard being paid to the prisoner's interest. He was apprehended at seven o'clock at night, kept in prison all night, and tried at ten o'clock next morning, and convicted. He had no one to consult with; there is a statement made to us that his wife applied for admission to see him, but was refused; and he had no agent at his trial. The suspender says now, and he so pleaded at the time he was charged, that he was not at the place where the theft had been committed, and that he had witnesses to prove that. I think that under the statute the magistrate was bound to inform the prisoner of his right to an adjournment for forty-eight hours to prepare his defence, and it is admitted that he had not done so. It is quite true that the magistrate might believe that when he said to the prisoner, 'Are you ready to go on?' that that conveyed an intimation to the prisoner that he had a right of adjournment, and he should have so assumed. But it is plain he might not have so understood it. I think it is a serious blot on the proceedings that the accused was not told of his right, especially when a plea of *alibi* was stated in defence. In such a serious case the magistrate should have distinctly informed him of his right, if he did not of his own motion adjourn the trial. I am therefore for suspending the sentence of the magistrate.

LORD YOUNG.—I am of the same opinion. Irrespective of our discretionary power to see that justice is done, I have serious doubts as to the legality of these proceedings.

I am aware that the General Police Act and some local Acts give power to the police to arrest parties whom they find committing an offence, or who are charged by responsible parties with having done so, without warrants. But I shall not enquire into the regularity of the apprehension in this case. I assume that it was regular, although the accused was apprehended without a warrant. The ordinary rule, and

1885.

No. 84.

Pyper

v.

Walker.

High Court,  
July 10.

Suspension.

1885.

No. 84.

Pyper

v.

Walker.

High Court,  
July 10.

Suspension.

the regular and usual course, no doubt, is that none of the Queen's subjects can be apprehended on a charge of theft or on any other charge except on a warrant signed by a magistrate, but I shall assume that this case fell within the exceptional powers I have spoken of.

The accused was apprehended at seven o'clock at night on what was a serious charge of theft, and was locked up all night. Mr Brand explained to us that the complaint, which is brought under the Summary Jurisdiction Acts, 1864 and 1881, was prepared next morning, after the magistrate had taken his seat on the bench, and that he then signed the warrant bearing that date to search for and apprehend the suspender and bring him before a magistrate, and in the meantime detain him in the police station. This was the warrant to apprehend and detain him : but he was there at the bar and had been detained all night without it. He was not apprehended under that warrant at all : he was not brought before the magistrate under it : he was there. Now section 6 of the Summary Procedure Act, 1864, provides, that 'on such complaint being laid before the Court it shall be lawful for the Court to grant warrant to cite the respondent by delivering a copy of the complaint, with warrant of citation, to him personally, or if he cannot, on search, be found personally, leaving such copy at his usual place of abode, to appear before the Court on an *induciae* of not less than forty-eight hours ;' or (where apprehension is competent), which I assume it was here, 'to grant a warrant for the apprehension and interim detention of the respondent.' That was what was done. But it is quite plain that the statute contemplated an *induciae*, and of not less than forty-eight hours, unless in exceptional cases. By clause 11 it is provided that any respondent brought before the Court by warrant of apprehension under the authority of the Act 'shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period of not less than forty-

eight hours.' Now I do not think that the meaning of the statute was followed or given effect to by what was done in this case. The man was apprehended without any warrant, and was not brought before the Court on the warrant made out on the morning of the trial; he was before the Court when the warrant was granted, and the trial was immediately proceeded with, and while he was without an agent. Now, as a matter of discretion, I think it was very indiscreet in a case which was stated to be a first offence not to give the prisoner a copy of the complaint and the *induciae* of forty-eight hours, but to place him at the bar at once. But if that was done—I think indiscreetly—the prisoner ought to have been distinctly informed that he was entitled to at least forty-eight hours to prepare his defence, if he desired it, and that a copy of the complaint would be served on him. But the case went at once to trial, and the evidence against him was one of pure identification by two boys aged 11 and 13, without any corroboration. The bale of cloth was not found on him, nor was he near the cloth when he was apprehended. It depends entirely on the two boys. The defence was *alibi*, and I cannot think in the circumstances the conviction is reasonably safe, looking to the ends of justice, and I concur in the propriety of setting aside the sentence.

LORD M'LAREN.—I entirely concur. I would not be disposed, and I do not suppose your Lordships would be either, to quash the sentence in an ordinary police case because the magistrate had not told the accused of his right to an adjournment, as it might not be in the interest of the accused in a trivial case involving two or three days' imprisonment that he should suffer forty-eight hours' imprisonment. But this is a serious charge of theft at common law, and I think it was the duty of the magistrate to inform the accused of his right to an adjournment in a case where a conviction might in itself be a serious matter, and still more so if it should come to be used as a previous conviction, so as to give

1885.

No. 84.

Pyper

v.

Walker.

High Court,  
July 10.

Suspension.

1885.

No. 84.  
Pyper  
v.  
Walker.

High Court,  
July 10.  
Suspension.

him every opportunity of proving his innocence, which he had clearly stated.

The following was the Interlocutor :—

‘*Edinburgh, 10th. July 1885.*—Having considered this Bill, and heard Counsel for the parties, Pass the Bill : Suspend the conviction and sentence complained of simpliciter, and decern : Find the Complainer entitled to expenses, which modify to five guineas.’

Agent for Suspender—J. A. T. STURROCK, S.S.C.

Agents for Respondent—CARMENT, WEDDERBURN & WATSON, W.S.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and M'LAREN.

JOHN STRACHAN DEAS, Suspender—*J. Guthrie Smith.*

AGAINST

CHARLES W. STEWART, AND OTHERS, Respondents—*C. J. Guthrie.*

STATUTE 29 AND 30 VIC., c. 118, SECS. 14 AND 38 (Industrial Schools Act, 1866)—INDUSTRIAL SCHOOL, DETENTION IN—POOR—CLAIM AGAINST PARISH FOR MAINTENANCE OF PAUPER CHILD IN INDUSTRIAL SCHOOL—INSPECTOR OF POOR.—A magistrate having granted orders under the Industrial Schools Act, 1866, for the detention of three children in an industrial school, as being subject to the provisions of the Act ; and the children having been detained thereon, a claim under section 38 of the statute for the expense of maintaining them was subsequently made by the Inspector of Industrial Schools against the Inspector of the Poor of the parish to which they were alleged to be chargeable as paupers, and the Inspector of the Poor thereupon presented a Bill in the High Court of Justiciary for suspension of the said orders, on the ground of irregularity in the proceedings, and of incompetency by reason of the children not being chargeable as paupers.

Held that the suspender had no title to insist, as it appeared that the children had never been chargeable to the Parish of which he was Inspector, they did not fall within the provisions of section 38, and the Bill dismissed.

1885.

No. 85.  
Deas  
v.  
Stewart.

High Court,  
July 10.  
Suspension.

THIS was a Bill for suspension of three warrants or orders dated 13th May 1884, granted by a Justice of the Peace for the county of Renfrew (William Ross), for the detention in a certified industrial school at Greenock

of three children aged 9, 10, and 11 respectively, children of Henry Getty, a labourer there. The Bill was at the instance of JOHN DEAS, Inspector of Poor of Greenock parish, against CHARLES W. STEWART, inspecting officer of the Burgh School Board of Greenock, the said Henry Getty and John Nicolson, Inspector of Reformatory and Industrial Schools.

1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

Each of the Warrants or Orders complained of bore to be in pursuance of 29 and 30 Vic., c. 118, The Industrial Schools Act, 1866, and that the child ordered in each case to be detained was subject to the provisions of section 14 of the Act.<sup>1</sup>

---

<sup>1</sup> Statute 29 and 30 Vic., c. 118 (Industrial Schools Act, 1866).

Section 14.—‘Any person may bring before two justices or a magistrate any child apparently under the age of fourteen years that comes within any of the following descriptions, viz. :—

‘That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale anything), or being in any street or public place for the purpose of so begging or receiving alms ;

‘That is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence ;

‘That is found destitute ; either being an orphan, or having a surviving parent who is undergoing penal servitude or imprisonment ;

‘That frequents the company of reputed thieves.

‘The justices or magistrate before whom a child is brought as coming within one of those descriptions, if satisfied on enquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school.’

Section 38.—‘In Scotland, where a child sent to a certified industrial school under this Act is at the time of his being so sent, or within three months then last past, has been chargeable to any parish, the Parochial Board and Inspector of the Poor of the parish of the settlement of such child, if the settlement of the child is in any parish in Scotland, shall, as long as he continues so chargeable, be liable to repay to the Commissioners of Her Majesty’s Treasury all expenses incurred in maintaining him at school under this Act, to an amount not exceeding five shillings per week, and in default of payment those expenses may be recovered by the Inspector of Industrial Schools, or any agent of the inspector, in a summary manner before a magistrate having jurisdiction in the place where

1885.  
 —  
 No. 85.  
 Deas  
 v.  
 Stewart.  
 —  
 High Court,  
 July 10.  
 —  
 Suspension.

That section empowers any person to bring before a justice of the peace in Scotland any child under the age of fourteen that comes under certain descriptions therein specified, and if such justice is satisfied that the child comes within one of these descriptions, and that it is expedient to deal with him under the Act, he may order him to be sent to a certified industrial school. And section 38 of the Act provides that if the child so sent to such school is at the time of being sent, or within three months then last past has been chargeable to any parish, the Inspector of Poor shall, as long as the child continues so chargeable, be liable to repay to the Commissioners of Her Majesty's Treasury all expenses incurred in maintaining the child at school under the Act to an amount not exceeding five shillings per week, and in default of payment those expenses may be recovered by the Inspector of Industrial Schools on behalf of the Commissioners of Her Majesty's Treasury.

It appeared that the respondent, Henry Getty, the father of the children, was, on 29th April 1884, while out of employment, admitted on his own application into the Greenock Poorhouse, along with his children, but that they were dismissed three days afterwards as not being proper objects of relief, he, the father, being able-bodied; and that immediately thereafter he obtained employment.

It was averred in the Bill that the magistrate had signed the warrants in his private office at the instigation and request of the respondent, C. W. Stewart, without making due enquiry or communicating with the suspender, as Inspector of Poor, and upon

---

the parish is situate, provided always that nothing in this Act shall prevent any Parochial Board on whose funds the cost of support of any such child has become a charge, from adopting such steps for the recovery of any sums which may have been paid by such Parochial Board for any such child against the parish of his settlement, or for his removal, as may be competent to them, under any Act for the time being in force relating to the relief of the poor in Scotland.'

Getty's own statement that he was out of work, that his wife had left him, and that he was unable to look after his children, or take proper care of them (which was the excuse given by him when found fault with by Stewart for not sending his eldest child to school); and that besides these statements being mostly false, the children did not, in point of fact, belong to any of the classes mentioned in section 14 of the Act to which the provisions of that section applied. That, notwithstanding, a complaint under the Summary Jurisdiction (Scotland) Acts, and founding on the 38th section of the Industrial Schools Act, 1866, was brought before the Sheriff, upon which the suspender was cited to show cause why he should not be found liable as Inspector of Poor in payment to Nicolson, on behalf of the Lords of the Treasury, of the sum of £20, 5s., being the expense incurred for the maintenance of the three children between 22nd May and 30th November 1884, detained under the orders complained of. That upon the Case being called in the Sheriff Court on 12th December 1884, and on proof being tendered by the complainer, the Sheriff refused to receive evidence, on the ground that he could not review the order made by another magistrate which appeared to be *ex facie* regular, and intimated that as he held that the fact of the children having been in the poorhouse was conclusive of their having been chargeable to the parish within three months of their committal, he would hold the Parochial Board liable under the 38th section of the Act, unless in the meantime the orders of date 13th May 1884 were quashed by a Court of Review.

The Bill of Suspension was accordingly brought, in which it was pleaded—1. As none of the children come within section 14 of the statute, the magistrate had no power to issue the said orders of detention, which ought to be *simpliciter* suspended. 2. No proper inquiry having been made into the facts, the said orders are illegal, and contrary to the statute. 3. The magistrate having no power to deal with the matter except when

1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.



1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

sitting judicially *coram publico*, and with the Clerk of Court present, or a deputy duly appointed, the orders pronounced by him are in the circumstances null, and ought to be suspended.

At the first hearing of the Bill before the High Court, the following Interlocutor was pronounced:—

‘*Edinburgh, 7th February 1885.*—Having considered this Bill, and heard Counsel for the complainer, there being no appearance for the respondents, Appoint the respondent Charles W. Stewart to lodge answers to this Bill within ten days from this date, and to appear at the bar of this Court, or to cause appearance to be made for him at the next diet in the cause.’

In the answers which were lodged by Stewart, he denied that the warrants were obtained at his instance, or that he had any communication with the Justice in relation to the granting of them, and explained that Getty had been dealt with on several occasions by him as School Board Inspector for not sending his children to school, and was prosecuted at his instance in March 1884 before two Justices, one of whom was Mr Ross—‘That on 13th May 1884 Getty came to the respondent’ office, and informed him that he had arranged with a magistrate to get three of his children sent to an industrial school, and asked him to fill up the blanks on the papers which were necessary in connection with the application to the magistrate. Getty gave as his reason for asking the respondent to do this, that he (Getty) was unable to do it for himself. The respondent said he would fill up the papers for Getty if he brought them. Accordingly, on Getty returning with the printed papers, which he said he had got at the industrial school, the blanks were filled up by the respondent with the necessary particulars, which were supplied by Getty. The forms were then taken away by Getty, and the respondent knew nothing more of the matter.’

The respondent Stewart pleaded in his answers—1. The complainer’s material averments, so far as this respon-

dent is concerned, being unfounded in fact, the respondent ought not to have been made a party to the present proceedings, and the complainer should be found liable in expenses. 2. The actings of the respondent not having been taken in his official capacity, the present proceedings are not relevantly or competently laid.

1858.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

At the next calling of the case, on 19th March 1885, after hearing counsel for the suspender—

LORD YOUNG said.—I don't like the answers which have been here lodged for the respondent (Stewart), who has appeared in obedience to an order of the Court. I think we should remit to the Sheriff of the county to inquire and report to us on the Case. We could not assume that the magistrate has acted in the irregular way imputed to him without an inquiry to satisfy us on the point. Meantime the children will remain where they are, as we could not turn them out.

The following was the Interlocutor :—

*Edinburgh, 19th March 1885.*—Having considered this Bill, with the Answers lodged for the respondent Charles W. Stewart, and heard Counsel, before answer, remit to the Sheriff of Renfrew and Bute to inquire into the averments made by the complainer on the Bill, and by the respondent Stewart in his answers, and to report to the Court the result of said inquiry.'

From the Sheriff's report it appeared that the following were the facts :—The respondent Getty, who was a labourer, and had resided at Greenock for ten years, had been prosecuted upon 18th March 1884 by the respondent Stewart, as School Board Inspector, before two Justices, one of whom was Mr Ross, for failing to attend to the education of his eldest daughter, and was convicted ; but, as it appeared in the course of the trial that he was in destitute circumstances and out of work, and that his wife had recently deserted him, sentence was not moved for, and Getty was dismissed with a reprimand.

On 29th April 1884, Getty, being still out of employ-

1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

ment, applied, and was admitted, along with his six children, into the Greenock Poorhouse, but three days afterwards, viz., on 3rd May, they were all dismissed on the ground that he, being an able-bodied man, he and his children were not proper objects of parochial relief. Thereafter the suspender, as Inspector of Poor, found work for him till the end of May, and he had been regularly employed ever since. After being dismissed from the poorhouse, Getty commenced in the beginning of May to endeavour to get his children admitted to the industrial school. He obtained from the officials of the school three blank orders for detention under section 14 of the Industrial Schools Act, 1866 ; and was told that if he got these orders signed by a magistrate three of his children would be admitted. And as Mr Ross had presided and Stewart had prosecuted at his trial on 18th March, and so were familiar with the facts of his case, he first took the orders to Mr Ross, who told him that if he got them filled up he would sign them. Getty accordingly took them to the respondent Stewart, who, on being asked, filled them up, and beyond doing so he had no hand in getting the children committed. Getty then returned with them to Mr Ross, and he, acting entirely upon his recollection of the case, and upon what he was told by Getty, signed them at his private office in Greenock without seeing the children or making any special inquiry, and without communicating with the suspender, the Inspector of Poor, or sending the children to the poorhouse, under section 19 of the statute, to admit of inquiry being made, and without the presence or knowledge of the Justice of the Peace Clerk. The children were not, it was reported, found begging, and although the neighbours had, while they were staying with their father, given them pieces of bread, they were not receiving alms in the strict sense of the term, and did not come under any of the other descriptions given in section 14 of the Act. Nothing more was said to Mr Ross by Getty than that he and his children were destitute and short of

ood, and dependent on their neighbours for assistance. 1885.  
The warrants were *ex facie* regular, and the children at No. 85.  
the date of the presentment of the complaint to the Deas  
the Sheriff had been detained six months. v.  
Stewart.

At the calling of the Case on 10th July 1885 the High Court,  
Court intimated that it was not clear what interest the July 10.  
suspender had in insisting on the Bill. Suspension.

J. GUTHRIE SMITH, for the suspender, replied.—The  
parochial authorities have not only an interest, but are, we  
submit, entitled to have the orders of detention set aside.  
In terms of the intimation made by the Sheriff at the hear-  
ing of the complaint against the suspender, the Parochial  
Board would be held liable under the statute in the Sheriff  
Court, unless the orders were quashed by a competent  
Court of Review. The Sheriff holds that where a child  
has been committed upon an *ex facie* regular warrant, a  
Sheriff has no power but to hold the Board liable under  
section 38, which declares that the Inspector of Poor  
shall be liable, as representing the Board, to the Com-  
missioners of the Treasury in all the expenses incurred  
in maintaining a child sent to an industrial school under  
the Act who has been chargeable to the parish within  
three months of his being so sent to such school. And  
the Sheriff is of opinion that these children at the date  
of their commitment had been chargeable to the parish  
of Greenock 'within three months then last past,' and  
that the orders were therefore competently granted and  
are *ex facie* regular.

THE LORD JUSTICE-CLERK.—But the section also says  
that you are to be liable so long only as the children  
continue so chargeable. Here the children did not con-  
tinue to be chargeable, if they ever were chargeable.

LORD YOUNG.—The words of section 38 of the statute  
are, 'shall as long as he continues so chargeable be  
liable to repay to the Commissioners,' &c.

J. GUTHRIE SMITH, for the suspender.—The Sheriff-  
substitute has read section 38 as meaning, as long as *he*  
*shall continue in the industrial school.*

1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

LORD YOUNG.—The question before us seems to be whether the Parochial Board have any authority to interfere where the child is not chargeable to the parish.

J. GUTHRIE SMITH, for the suspender.—In the case of *The Lord Advocate v. Brown*, 2nd December 1875, iii.

R., p. 188, which was a similar case, and there was no question as to the chargeability of the child at the time he was sent to school, it was laid down that the Inspector of Poor had a right to inquire into the validity of the warrant and into the continuance of the chargeability. In the present case the parochial authorities felt that, following the announcement by the Sheriff-substitute of his views, they had no good answer to the complaint brought against the Inspector by the Commissioners for the Treasury, unless the chargeability was inquired into. They therefore thought it expedient and necessary to bring the present Bill.

LORD YOUNG.—I cannot see that it was. Your defence to any action would be, the children were not chargeable.

At advising—

LORD YOUNG—This case has been already twice before, I think, Lord Craighill, Lord Adam, and myself, and I was then much impressed by the fact that although there might have been an irregularity in the proceedings by which these children were sent to the industrial school, they were there, and it was the best place for them. It may be that they were not within the limits of clause 14 of the statute, but they were really going loose on the street; and although the father was an able-bodied man, yet he was out of work at the time. That the father was chargeable as a pauper, and that the Parochial Board of Greenock was liable for the children's maintenance, was urged on us as a title on the part of the Board to complain, and considering the cost of maintenance incurred, we thought it right in the public interest that the alleged irregularity should be inquired into, and we therefore remitted to the Sheriff to report on the whole

circumstances. The result of his report is, that while there was a good intention, and in the result nothing but benefit to the children, there was an irregularity in the course of the proceedings taken for their good. It appears to be quite clear from the report that the father of these children was an able-bodied man, and that neither he nor they, since the initiation of these proceedings, were chargeable as paupers. Now, in these circumstances, the Court was entitled, at the instance of parties entitled to appear, to inquire carefully into the proceedings, and if they were found to have been irregular, to set the children free. But I do not find that in the case of children so sentenced there is any title or interest in the Parochial Board to complain. The children are there at the cost of the father, and he is satisfied that is the best place for them to be, whether there was irregularity in the proceedings or not, and he is liable for the expense of keeping them there. In these circumstances I should be very much disinclined, on a general abstract ground of irregularity of proceedings, to take the children away from a place where they are so well cared for, and turn them into the streets. I should therefore propose to your Lordships that we should find that the complainer has no title to complain, and on that ground dismiss the complaint.

I am not moved by the view taken by the Sheriff-substitute—or what is represented to us as his view—that he would not listen to evidence on the question whether the children were chargeable or not. I am tempted to think that the suggestion that he did so must be erroneous, because under the statute the parochial authorities are liable when children become chargeable, and so long as they are chargeable, and if they are not chargeable, or when they have ceased to be chargeable, they are not liable.

I therefore propose that this suspension should be refused on the ground of want of title on the part of the parochial authorities.

1885.

No. 85.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

1885.

No. 86.

Deas

v.

Stewart.

High Court,  
July 10.

Suspension.

LORD M'LAREN.—I concur on the last question. I would just suggest an illustration of the necessity of the Sheriff having to consider the question of chargeability. Where the parents are the object of relief it is possible that during the period of five years in which the children were detained in the industrial school the parish of the parents might be changed, and the liability with it. If the Sheriff were bound to consider the question of chargeability between two parishes, he must be bound to consider that of chargeability to any.

THE LORD JUSTICE-CLERK.—I quite concur with Lord Young that the children are better where they are, though they may have been sent there through an irregularity of procedure. But it turns out now that the father was an able-bodied man at the time of the sentence, and has been since, and that in fact during the three years in which they have been in the school they never were chargeable to the parish, and on that ground therefore I think the interest of the parochial authorities is at an end, or rather never commenced, and that we should not interfere, but dismiss the complaint in respect the complainer has no title to insist.

The following was the Interlocutor :—

'*Edinburgh, 10th July 1885.*—Having resumed consideration of the cause, with Report by the Sheriff of Renfrew and Bute, and heard Counsel for the parties, In respect the complainer has no title or interest to insist in this Bill of Suspension, Refuse the Bill, and decern.'

Agents for Suspender—Messrs R. R. SIMPSON & LAWSON, W.S.

Agents for Respondent Stewart—Messrs MACONOCHE & HARE, W.S.



Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG AND M'LAREN.

JAMES CARLIN, Suspender—*W. Mackintosh and C. J. Guthrie.*

AGAINST

THE GOVERNMENT OF THE COLONY OF THE CAPE OF GOOD HOPE,  
and GEORGE M. WOOD, Edinburgh, for and as representing  
said Government, Respondents—*Solicitor-General (Robertson)*  
*and Omond.*

FUGITIVE—FOREIGN—STATUTE 44 AND 45 VIC., c. 69. (Fugitive  
Offenders Act, 1881)—WARRANT, ENDORSED BY SECRETARY OF  
STATE—SECRETARY OF STATE—*CRIMEN CONTINUUM*—LOCUS.—  
Held that when a warrant endorsed by one of Her Majesty's  
Secretaries of State, duly authenticated, is presented to a magis-  
trate under the Fugitive Offenders Act, 1881, it must be  
received by him as a warrant regular and valid in all respects.

A warrant endorsed by one of Her Majesty's Secretaries of State  
bore that, from information taken upon oath before a magistrate  
in one part of Her Majesty's dominions, there were reasonable  
grounds of suspicion that a person named did, on a day named,  
'commit the crime of murder.'

Held that this warrant, although the name of the person murdered  
was not given, nor the *locus* mentioned, nor any statement made  
that the *locus* was within Her Majesty's dominions, must be  
received by the Sheriff to whom it was presented under the  
Fugitive Offenders Act, 1881, as valid and regular in all respects.

In the depositions and oral evidence put before a magistrate  
under the 5th and 6th sections of the Fugitive Offenders Act,  
1881, there was evidence that the fugitive had an interest in  
preventing the appearance of the person alleged to have been  
murdered at a trial shortly to take place in the British Colony  
of the Cape of Good Hope; that the fugitive and the deceased  
left British territory together; that the former had severely  
beaten and afterwards handcuffed the latter, not, however,  
on British territory; and that a body, said to be the body  
of the person who had been so treated, was found about  
a fortnight afterwards in a well on British territory. Held  
that the evidence raised 'a strong or probable presumption'  
(1) that the fugitive had committed the offence charged against  
him, and mentioned in the warrant for his apprehension, viz.,  
murder; and (2) that the offence had been committed in Her

Majesty's dominions, and that the case thus fell under the provisions of the Act.

1885. THIS was a Bill of Suspension and Liberation presented by JAMES CARLIN, engine-driver, Edinburgh, a prisoner in the prison of Edinburgh, against a judgment pronounced by Hubert Hamilton, advocate, one of the Sheriff-substitutes of the Lothians and Peebles, upon an application presented by GEORGE M. WOOD, S.S.C., as solicitor for, and as representing the Government of the Colony of the Cape of Good Hope, finding that the evidence in support of a warrant for the complainer's apprehension issued by a Justice of the Peace for the said colony, and endorsed in terms of the Fugitive Offenders Act, 1881,<sup>1</sup> by the Secretary of State for the Home

No. 86.  
Carlin  
v.  
Government  
of Cape  
Colony.  
High Court,  
July 18.  
Susp. & Lib.

<sup>1</sup> Statute 44 and 45 Vic., c. 69 (The Fugitive Offenders Act, 1881).

*Part I. Return of Fugitives.*

Section 2.—‘Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is fugitive. A fugitive may be so apprehended under an endorsed warrant.’

Section 3.—‘When a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be ; (that is to say)

‘(1) . . . . .’

‘(2) In the United Kingdom a Secretary of State . . . if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before magistrate.’

Section 5.—‘A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and

Department in the United Kingdom, raised a strong or probable presumption that the complainer committed the crime therein mentioned, viz., that he did, on the 28th March 1885, commit the crime of murder, and that the Fugitive Offenders Act, 1881, applied, and committing him therefore to await his return to the colony.

1885.  
 No. 86.  
 Carlin  
 v.  
 Government  
 of Cape  
 Colony.  
 High Court,  
 July 10.  
 Susp. & Lib.

Carlin was apprehended on 17th May 1885, in his house in Edinburgh, and on the 25th May he was taken before the Sheriff-substitute, and reapprehended on a provisional warrant in terms of section 4 of the Fugitive Offenders Act, 1881, and remanded in terms of section 5 of said Act to await the arrival of an indorsed warrant from the said colony; and after further remand, he was again brought before the said Sheriff-substitute on 13th July 1885, when a warrant, signed by a Justice of the Peace for the colony of the Cape of Good Hope, addressed to the officers of the law proper for the execu-

admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

‘If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the Governor of that possession.

‘Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* or other like process.

‘A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant.’

Section 6.—‘Upon the expiration of fifteen days after a fugitive

1885. tion of it, and indorsed by the Home Secretary, was  
 No. 86. presented, and which was in the following terms :—  
 Carlin  
 v.  
 Government  
 of Cape  
 Colony.  
 High Court,  
 July 10.  
 Susp. & Lib. warrants.

‘Whereas, from information taken upon oath before me, there are reasonable grounds of suspicion against James Carlin, lately of Kimberley, that he did, on the 20th day of March 1885, commit the crime of murder : These are therefore in Her Majesty’s name to command you, that immediately upon sight hereof you apprehend and bring the same James Carlin, or cause him to be apprehended and brought before the resident magistrate of Kimberley, to be examined and to answer to the said information, and to be further dealt with, according to law.

---

has been committed to prison to await his return, or if a writ of *habeas corpus*, or other like process, is issued with reference to such fugitive by a Superior Court after the final decision of the Court in the case, (1) if the fugitive is so committed in the United Kingdom, a Secretary of State, and (2) if the fugitive is so committed in a British possession, the Governor of that possession, may, if he thinks it just, by warrant under his hand, order that fugitive to be returned to the part of Her Majesty’s dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty’s dominions, to be dealt with there in due course of law, as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

‘The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive, and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.’

‘ Given under my hand at Kimberley this 30th day of May 1885. 1885.

‘ E. A. JUDGE,  
‘ *Justice of the Peace.*’

No. 86.  
Carlin

Government  
of Cape  
Colony.

‘ 44 and 45 Vic., c. 69, I hereby indorse this warrant in pursuance of the statute in that case made and provided.

‘ RICHD. ASSHETON CROSS.’

High Court,  
July 10.

[Seal.]

Susp. & Lib.

The depositions of the witnesses which had been taken before the Justice at Kimberley, and which were annexed to the warrant, having been read before the Sheriff, two witnesses were examined on oath, one of whom had also deposed before said Justice, and counsel for the parties were heard, whereupon the Sheriff-substitute pronounced the following sentence of committal :—

‘ *Edinburgh, 13th July 1885.*—The Sheriff-substitute having heard the counsel for the colony of the Cape of Good Hope, and the counsel for the accused, and having considered the evidence produced: Finds, that the evidence raises a strong or probable presumption that the prisoner committed the offence mentioned in the warrant, and that the offence is one to which the Fugitive Offenders Act, 1881, applies: Therefore commits the said James Carlin to prison, to await his return to the colony of the Cape of Good Hope: And grants warrant to officers of Court to incarcerate the said James Carlin accordingly to the prison of Edinburgh.’

The import of the evidence laid before the Sheriff-substitute was to the effect that a woman of the name of Ann Eatwell, of Kimberley, Cape of Good Hope, a town on the borders of the Orange Free State, having been suspected of illicit diamond buying, was, at the instance of the Cape Government Detective Department, trapped into buying diamonds by a native of the name of Jonas, who was in the employment of said government as a government trapper, and who had previously been assisting Eatwell in purchasing diamonds, and that Eatwell was arrested and imprisoned in March 1885, upon infor-

1885. mation given by Jonas, who was retained as a principal witness against her.

—  
No. 86.  
Carlin  
v.  
Government  
of Cape  
Colony.  
—  
High Court,  
July 10.  
—  
Susp. & Lib.

The suspender Carlin had been associated with Eatwell, and had visited her frequently while she was in prison awaiting her trial, and was deponed to have said to her on one of those occasions, 'I'll find him (Jonas), and if I find him you'll get free.' In the end of March Jonas was amissing from Kimberley, having been last seen on the 13th of that month. One afternoon, about that time, Carlin, while in company with a native who answered the description of Jonas, hailed a cab in Kimberley, which both entered, the native doing so quite willingly, and were driven at their request about six miles to the house of a man named Reid, in Freetown, which is in the Orange Free State, and from there, after being joined by others, they started to drive to Oliphant's Fountain, which is further into the Free State. Shortly after they started, the native endeavoured to make his escape, but was pursued by Carlin and Reid, and with the assistance of a dog they secured him, and he was handcuffed. He was also struck repeatedly and severely on the head by Carlin and another of the party, and was insensible. In his deposition before the Justice, and examination before the Sheriff, a witness (Edward Yetty) swore:—'When the native was recovered and beaten by Carlin and the others, I ran up and took the native away from them, and remarked that they would kill him if they struck him like that. I took the native to a stable next to Reid's house, and Reid and two men followed us. In the stable the short man,' i.e., Carlin, 'struck the native again four or five times with the "sjambok," and drew a revolver and held it to his face and told him to smell it. No offer was made to the native to go away. In consequence of what the native told me, I offered to the two men'—Carlin and another—'to keep him away till the case was over for £25. The short man replied, "It is not good enough, Ned." This was before we got to the stable. We four handcuffed the native in the stable, and

brought him out to the cart (cab). The two men '—i.e., Carlin and another, and Reid—'told him to get into the cart, but he would not, and said in Kaffir, "These people are going to kill me." The two men tried to force him into the cart, and he struggled with them, and then Reid struck him about four blows with a pick handle on the head and shoulders. He held the pick with his hands and struck with all his force. The native fell down when struck, and did not speak again, but appeared to be insensible. I saw blood running from a wound on the side of his head caused by the blows. He was then placed in the cart by some other natives by order of Reid, which I interpreted. The two men then got into the cart and sat beside him on the back seat, one on each side of him, and held him. He did not struggle or speak any more, but hung his head down like a person intoxicated. The two men had previously told me that they were going to take him to Boshof, and they left by the Boshof road, the cabman, Dixon, driving.' Boshof is also in the Orange Free State. They drove to a place called Wessel's or Nixon's Farm, also in the Orange Free State, and then the cabman left the party. On 2nd April a body, very much decomposed, was found in a well at Kamfers Dam, about five miles from the town of Kimberley. There was no statement in the depositions whether this was in the Queen's territory or beyond it. There was evidence as to the identification of the body as that of Jonas. The features were past recognition. There were handcuffs on the corpse.

Some oral evidence was led before the Sheriff to identify Carlin, and documentary evidence was produced to show that he was in Kimberley on 17th March. He led no evidence before the Sheriff, and was not present or represented at the inquiry before the Justice at Kimberley.

In the Bill it was stated—The indorsed warrant on which the complainer has been apprehended does not specify the place where the alleged crime was committed.

1885.

No. 88.  
Carlin  
v.Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib.



1885. The town of Kimberley, where the warrant was granted,  
 No. 86. is situated close to the borders of the Orange Free State,  
 Carlin and the places mentioned in the depositions annexed to  
 v. the indorsed warrant, are not alleged or proved to be in  
 Government of any part of Her Majesty's Dominions, to which alone the  
 of Cape Colony. Fugitive Offenders Act, 1881, applies. Further, it  
 High Court, appears from the evidence of Yetty that Freetown  
 July 10. (where the house of Frank Reid, mentioned in the depo-  
 Susp. & Lib. sitions, is situated) is in Orange Free State; so also  
 are Boshof, Oliphant's Fontein, and Wessel's or Nixon's  
 Farm, where the complainer is alleged to have been  
 last seen with Jonas, the native he is accused of having  
 murdered.

In the Bill it was pleaded—(1) The offence mentioned in the warrant is not alleged or proved to have been committed within any part of Her Majesty's Dominions, and the Government of the colony of the Cape of Good Hope, and the Courts of the United Kingdom have, therefore, no jurisdiction in the matter. (2) The evidence contained in the depositions produced in support of the warrant is not sufficient to raise a strong or probable presumption that the complainer committed the offence mentioned in the warrant, and the judgment of the Sheriff-substitute should therefore be recalled, and letters of suspension and liberation granted in terms of the prayer of the Bill.

MACKINTOSH and GUTHRIE, for the suspender, contended—The evidence proved the native to have been amissing on 13th March; the warrant fixed the 20th as the day of the murder; now Carlin had returned to Kimberley on the 17th, or before it. The warrant does not specify any *locus*, or indeed any person as murdered. The evidence shows that any violence offered was offered outside the Queen's territory. Jonas left that territory willingly, and even granting that a murder has been committed outside, of which, however, there is no proof, the act done in the Queen's territory amounts to nothing more than the abduction of a witness, who went wil-

lingly, induced, in all likelihood, to do so by a bribe. There is no evidence as to where Kamfers Dam is: it cannot be assumed to be within the colony. At common law a criminal will only be given up to the authorities of the place where the crime was committed. The principle of our criminal law is territoriality. Phillimore's International Law, p. 456; Hume, vol. ii. p. 57. *Att. Genl. of Hong Kong v. Kwok-a-Sing*, 19th June 1873, L.R. v. P.C. App., p. 179. It has not been settled, even in cases under the Extradition Act, that a Superior Court will not interfere with the judgment of a magistrate as to the weight of evidence against the accused. On the merits, and on the question of territoriality, and having regard to section 6 of the Fugitive Offenders Act, which evidently contemplated review of the Sheriff's judgment, the present question is *a fortiori* in the suspender's favour.

The LORD JUSTICE-CLERK intimated that the only question on which the Court desired further argument was whether there was here an accusation of an offence under the statute.

The SOLICITOR-GENERAL and OMOND, for the respondent, replied.—The crime is a *crimen continuum*, and is, perhaps, cognisable in either territory, having been committed in both. It was conceived in Kimberley, and begun there; continued in Orange Free State, and ended again in Kimberley—for Kamfers Dam is, as a matter of fact, in Kimberley. That fact was notorious, and did not require to be mentioned in the warrant any more than it would require to be mentioned in a warrant laid before the Sheriff here that any village or place within his jurisdiction was so situated. The provision in the 21st section of the Act, that where an offence is committed on any person, &c., on a journey, the person accused may be tried in any British possession through a part of which such journey has passed, is directly in point. The English cases on extradition go thus far, that if the evidence is such as to give the magistrate jurisdiction to

1885.

No. 86.

Carlin

v.

Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib.

1885.

No. 86.  
Carlinv.  
Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib.

surrender the prisoner, the Court will not interfere with his judgment as being against the weight of the evidence, and the same principle ought, it is submitted, to guide the Court in the present case. *Reg. v. Maurer*, 16th Apr. 1883, L. R. x. Q. B. Div., p. 513.

The LORD JUSTICE-CLERK.—This is a somewhat unusual application, and there is, of course, no direct authority as to the procedure under this particular statute, or the principles of law to be applied to it. But it seems to us that there is not much ground for hesitation as to the course which we, sitting as a court of review, should follow. The statute which regulates the matter is The Fugitive Offenders Act, 1881, containing provisions of great importance to the proper administration of justice. The present case is an important one to the party who claims our protection; for if he is given up to the colonial authority, it is obvious that he stands in the greatest peril. Now the Act says in its second section, that where a person accused of having committed an offence in one part of Her Majesty's dominions . . . has left that part, such person (in this Act referred to as a fugitive from that part), if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive. A fugitive may be so apprehended under an indorsed warrant or a provisional warrant.

The statute then goes on to provide for the granting of warrants and examination before a magistrate. The 5th section is—[reads, see footnote, p. 650]. All that has been done here. The prisoner was brought before the Sheriff of Edinburgh on a warrant, which had the effect of bringing him before the magistrate. The Sheriff heard the evidence, and he has found that the evidence raises 'a strong or probable presumption that the fugitive committed the offence mentioned in the warrant.' The deliverance of the Sheriff has been brought before us by the Bill of Suspension.

The case disclosed by the evidence is very peculiar, and it contains a great deal that is doubtful. But when I am asked if the conclusion of the Sheriff is one that is reasonably warranted by the evidence, I can see no reason to say that it is not. We are not dealing with the evidence on the merits, and I do not say anything as to what is proved. I think it would be quite outside our duty to pronounce any opinion upon that. It may turn out that the evidence will not amount to proof; but does it contain elements creating a presumption that the prisoner committed the act with which he is charged? I think it does.

But was there a sufficient accusation here of a crime committed in British territory in terms of the second section of the statute? I had some difficulty in answering that question, but I think that the answer that was suggested in the course of the discussion was probably sufficient. That answer was that this was a *crimen continuum*. The prisoner, if the evidence is true, had an interest in getting Jonas out of the way. He started with him from Kimberley and took him into the territory of the Orange Free State, from which he never emerged. If the evidence is sufficient to show that there was an intention of murdering Jonas when they left British territory, then the crime may be held to have been committed there, and the jurisdiction to punish will be sufficiently established.

On the whole matter I am not disposed to interfere with the result at which the Sheriff has arrived.

LORD YOUNG.—I entirely agree, and it is only because this is the first case we have had to deal with under this statute that I make any observations. The case is brought under the Fugitive Offenders Act, 1881, and it is abundantly clear that that Act applies only to offences committed within Her Majesty's dominions. Clause 21 no doubt provides that if an offence is committed on a vehicle, or on board a ship, or the like, which passes through any part of the Queen's dominions, then the

1885.

No. 86.  
Carlin  
v.Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib.

1885.  
 No. 86.  
 Carlin  
 v.  
 Government  
 of Cape  
 Colony.  
 High Court,  
 July 10.  
 Susp. & Lib.

offence may be taken to have been committed in that part of the territory through which it passes at one point of its journey. But that clause merely declares what is to be considered to be Her Majesty's dominions. It applies to no other effect. We are concerned here first of all with the third clause. According to its provisions the warrant may be indorsed by a Secretary of State. I take it that the warrant here is the kind of warrant referred to, and it has been indorsed by the Secretary of State as such. It is not in the terms with which we are familiar, and not such as we should sustain in our own practice. It sets forth a date, but it so happens that the date is erroneous, and it sets forth no *locus*, and though it does set forth that the crime committed was the crime of murder, it does not say who was murdered. I assume, however,—I must assume,—that this is a regular warrant, for it comes to us indorsed by the Secretary of State as a regular warrant in the way required by the statute.

The fifth clause refers to the offence mentioned in the warrant. We must identify the offence by the evidence led before the Sheriff as the offence mentioned in the warrant. Now, the Sheriff is, as I think, very properly satisfied that that was the murder of the native Jonas on or after the 13th March. I think the evidence shows that the Sheriff is warranted in saying that that is the offence mentioned in the warrant. Now, with that preface I read the 5th section—[reads, see footnote, p. 650]. Now, irrespective of the question of *locus*, it appears to me not doubtful that the evidence submitted to the Sheriff was such that he could not for one moment hesitate in committing the prisoner to trial in accordance with the law which he ordinarily administers. One witness said he saw the accused using very serious violence to the deceased. It is also said by witnesses that he had an interest in getting the deceased out of the way, and that he started with him on the journey in the course of which this serious violence was used, and from which the deceased never returned.

But the question of *locus* is very important. If Free-town or Wessel's or Nixon's Farm were in the county of Kimberley, then there would be no question of *locus*, and I cannot question the propriety of this man being sent out for trial. It is the case that the prisoner and some of his companions desired that Jonas should not appear at a trial in which they were interested. Then we have evidence of bad usage, of handcuffs being put upon Jonas, and then his body is found at Kamfers Dam. But all the places where actual violence was used are in the Orange Free State. The question at the trial will be, first, whether this man was murdered at all? That is a question which it is right should be tried; and it will also be quite right to try the question whether the murder was committed in Kimberley or in the Orange Free State? I say it is proper that that question should be tried, but it does not occur to me that there is not fair evidence for saying that it was committed in Kimberley. I assume that Kamfers Dam is in Kimberley. The Solicitor-General tells me that it is, and I am bound to take it from him that it is so. Jonas, then, is taken away from Kimberley on this fatal journey, the violence of which we have evidence was done just over the border, and then, returning to the state from which he set out, in which the proceedings commenced, we find his body in Kimberley. I cannot doubt that the Sheriff acted rightly; certainly he had reasonably sufficient evidence to warrant him in coming to the conclusion that it is fitting that this man should be sent out to Kimberley to be tried.

There is still another safeguard; there is an appeal to the Secretary of State, and it remains with him to say whether this man shall be given up.

It is not unimportant that we should adjudicate upon the principles upon which such cases as this should be determined, this being the first that has come under our notice. It is for that purpose that I have made these observations. I have referred to the evidence not at all as being of opinion that it is sufficient to justify a ver-

1885.

No. 86.  
Carlinv.  
Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib.

1885.  
 No. 86.  
 Carlin  
 v.  
 Government  
 of Cape  
 Colony.  
 High Court,  
 July 10.  
 Susp. & Lib.

dict against the prisoner. His trial may result in a triumphant acquittal. The only question I have considered is, whether the evidence is or is not sufficient to warrant the Sheriff in coming to the conclusion with which we are asked to interfere. On the whole matter, I have no hesitation in holding that the Sheriff acted quite reasonably on probable evidence, and that we should not interfere.

LORD M'LAREN.—I entirely agree with what your Lordships have said as to the Sheriff's judgment upon the evidence, and do not wish to make any observations upon that matter. I think the Sheriff has taken a reasonable view of the evidence, and that being so, it would not be according to the practice of this Court to interfere. The statute makes the Sheriff or Magistrate the judge of the sufficiency of the evidence, and he is to consider it in the same light as in an application to commit a prisoner in order to trial for a crime committed within the territory.

Upon the legal aspect of the case there are two points upon which I desire to say a few words—the first relating to the form of the warrant, the second to the jurisdiction. Now, it appears to me, on a consideration of the statute in all its clauses, that it was not intended that the Sheriff or Magistrate should form or express an opinion on the validity of a warrant, which is sent to him for the purpose of determining whether the prisoner ought to be returned to the country from which he is a fugitive. It comes to the Sheriff as a Secretary of State's warrant, because it is the Secretary of State's indorsation which gives currency to the warrant in this country; and it comes to the Sheriff through that official channel for the very purpose, as I conceive, of relieving the Sheriff from the responsibility of considering the validity of the document, which he may well be incompetent to adjudicate upon. If there is any good objection to the form of the warrant, it will no doubt be considered *in limine* by the Secretary of State, who has



facilities for inquiry as to the laws and usages of colonial governments which the Sheriff does not possess. The Sheriff, I take it, is to receive the warrant issued by his official superior as a valid warrant in all respects, and his sole duty is to consider whether the evidence laid before him is such as will justify him in committing the prisoner for trial upon the specified charge. Now, the views I have expressed enter, to a certain extent, into the question of jurisdiction. It is essential to the validity of the warrant that the offence charged is an offence supposed to be committed in the Queen's dominions, otherwise the Secretary of State would have no jurisdiction. But this need not be expressed in the warrant, and, in my opinion, the warrant is to be assumed to be in proper form. But if it appears on the face of the proceedings—I mean on the depositions and oral evidence—that the offence was not committed within Her Majesty's dominions, then I apprehend it will be the duty of the magistrate to refuse to grant a warrant of commitment for trial. But I am bound to say that, considering the evidence for the purpose of satisfying myself whether the offence was or was not committed within Queen's territory, I cannot accept the view that a crime was not committed within the Cape Colony. On the contrary, I think that there is evidence that the crime was planned in Kimberley, and begun to be carried out there. I think that the depositions point to this conclusion, that from the time the unfortunate man entered the cab until he was last seen he never was a free agent. If it were necessary, I should be prepared to support the commitment on the words of the 21st section of the statute, which introduces our doctrine as to *crimen continuum*. I think that at common law, as well as upon the terms of that section, there was evidence sufficient to warrant the Sheriff in holding that the crime which was begun, and to a certain extent carried out, in Kimberley, and apparently completed at Kamfers Dam, was thus committed in the Queen's dominions.

1885.

No. 86.  
Carlinv.  
Government  
of Cape  
Colony.High Court,  
July 10.

Susp. &amp; Lib

1885.

No. 86.  
Carlinv.  
Government  
of Cape  
Colony.

July 10.

Susp. &amp; Lib.

The following was the Interlocutor :—

‘*Edinburgh, 18th July 1885.*—Having considered this Bill, and heard counsel for the parties, Refuse the Bill, and decern.’

Agents for the Suspender—JOHN C. BRODIE &amp; SONS, W.S.

Agents for the Respondents—GEORGE MURE WOOD, S.S.C.

Present,

THE LORD JUSTICE-GENERAL

LORDS YOUNG and ADAM.

DAVID and ROBERT ROBERTSON, Suspenders—*A. J. Young.*

AGAINST

GEORGE SCOTT CAIRD, Respondent—*Rankine.*

**FRAUDULENT BANKRUPT—STATUTE 43 AND 44 VIC., c. 34, sec 13** (Debtors (Scotland) Act, 1880)—**DEBTOR IN A PROCESS OF SEQUESTRATION—ART AND PART.**—A person who was neither a debtor in a process of sequestration or cessio nor insolvent, having been convicted of the offence specified in section 13 of the Debtors Act, 1880, on the ground that he had assisted such a debtor, of whose position and fraudulent design he had full knowledge, to conceal his effects: The Court suspended the conviction, on the ground that a person so assisting, not being a debtor in the sense of section 13, viz., a debtor in a process of sequestration or cessio, he could not competently be convicted under it.

No. 87.  
Robertsons  
v.  
Caïrd.High Court,  
Aug. 12.

Suspension.

THIS was a Bill at the instance of DAVID ROBERTSON and ROBERT ROBERTSON, for suspension of and liberation from a conviction and sentence by one of the Sheriff-Substitutes for Aberdeenshire, &c., at Stonehaven (John Dove Wilson, Advocate), upon a criminal libel at the instance of GEORGE SCOTT CAIRD, Procurator-fiscal of Kincardineshire.

The libel charged ‘The wicked and fraudulent concealment and putting away or disposing of his property or effects by a person insolvent, or on the eve, or in contemplation of bankruptcy, for the purpose of defrauding

his creditors, as also the statutory crimes and offences set forth in section 13 of The Debtors (Scotland) Act, 1878, subsection A 3, and subsection B 5, or of one or other of said statutory crimes and offences, actor or art and part.'

It is provided in that section [43 and 44 Vic., c. 34, the Debtors (Scotland) Act, 1880, sec. 13]—'The debtor in a process of sequestration or cessio shall be deemed guilty of a crime, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury, for any time not exceeding sixty days, with or without hard labour (A), in each of the following cases, unless he proves to the satisfaction of the Court that he had no intent to defraud; that is to say . . . (3) If, after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of any book, document, paper or writing, relating to his property or affairs. . . . (B) In each of the cases following . . . (5) If being insolvent, and with intent to defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of, or any change on or effecting his property.'

The libel set forth that the accused were both and each, or one or other of them, guilty of the common law crime above stated, and of the statutory crimes and offences, actors, &c.

IN SO FAR AS, David Robertson having been tenant of Roughbog, and having failed to pay any rent for the said farm for the crop and year 1884, and having become indebted to the landlord therefor, and the landlord having applied for and obtained sequestration for the rent of that year under his right of hypothec, and David Robertson having afterwards (February 1885) been sequestrated on his own petition, and a trustee appointed, and the said David Robertson having been insolvent for at least three months or thereby, immediately prior to the said 16th day of February 1885, or being then

1885.

No. 87.  
Robertsons  
v.  
Caird.

High Court,  
Aug. 17.

Suspension.

1885.  
 No. 87.  
 Robertsons  
 v.  
 Caird.  
 High Court,  
 Aug. 17.  
 Suspension.

on the eve or in contemplation of bankruptcy, and he having formed a fraudulent design to conceal and put away from his creditors a large quantity or quantities of his property or effects for the purpose of being appropriated to his own uses, and thus to defraud his creditors, or one or more of them, the said David Robertson, in prosecution of his said fraudulent design, and the said Robert Robertson acting in concert with him, and in the knowledge of the said fraudulent design, and of the insolvency of the said David Robertson above libelled, did, both and each or one or other of them, on various or one or more occasions during the months of December 1884 and January and February 1885, the particular time or times being to the complainer unknown, and being within four months next before the presentation of the foresaid petition for sequestration of the estates of the said David Robertson, wickedly, fraudulently, and feloniously conceal and away put or disposed of, or did cause or procure to be concealed and put away or disposed of 'a quantity of farm stock and other effects, the property of David Robertson, and forming part of his effects, ' by carrying off and conveying the same, or causing or procuring the same to be carried off or conveyed ' from Roughbog to Middleton of Rottearns, ' and all this, or part thereof, the said David Robertson and Robert Robertson did, the said David Robertson being in insolvent circumstances, or on the eve or in contemplation of bankruptcy, for the purpose of concealing and putting away the said property and effects from the diligence of the creditors of the said David Robertson, that the same might be subject to his disposal or control, and for the purpose of defrauding his lawful creditors, or otherwise,' that at the time above libelled David Robertson ' did make, or cause to be made, delivery or transfer of ' the same stock, &c., as was already enumerated, ' the property of the said David Robertson, by then and there delivering or transferring, or causing the same to be transferred or delivered, to the said Robert Robertson, and this, or part thereof, the said David Robertson did at a time when he was insolvent, and with intent to defraud his creditors, or one or more of them, the said Robert Robertson well knowing him to be so, by concealing or endeavouring to conceal, the fact that the said property and effects, so transferred or delivered formed part of the estates of the said David Robertson.'

At the first diet the libel was found to be relevant, and at the second diet the case went to trial, when the Jury unanimously found both panels ' guilty as libelled,' and the Sheriff (J. Dove Wilson) passed sentence of six months' imprisonment upon each.

The present process of suspension and liberation was then brought.

The grounds of suspension as ultimately argued to the Court were—(1) That Robert Robertson, not being a person to whom the Debtors Act applied, could not competently be convicted of the statutory charge, and that the general verdict, ‘guilty as libelled,’ was therefore bad. (2) That the minor proposition of the indictment was alternative, and the conviction was general, and therefore that the conviction was bad.

A. J. YOUNG, for the suspenders. — The statutory charges cannot be applied to Robert Robertson. He was not a ‘debtor,’ and to a debtor only did the statute apply. In order to be obnoxious to it the accused must be a debtor in a process of sequestration or *cessio*. Robert Robertson was neither, and it was not even averred that he was. No statutory crime was therefore averred against him, and the conviction being ‘guilty as libelled,’ inferred that he had committed the statutory crime, and therefore it could not stand. (2) The minor proposition was alternative; it charged ‘fraudulently concealing, away putting, or disposing of’ property ‘or otherwise’ ‘making or causing to be made delivery or transfer of’ property with intent to defraud creditors. The object of the framer of the libel was to charge alternatively the offence in A (3) and that in B (5). But the verdict was general, and the conviction was therefore bad.

Argued for respondent. — (1) The statutory charge applied to Robert, for though not debtor or insolvent, he was rightly charged and convicted of being art and part in his brother’s crime. A crime may always be committed by accession, the only and well-known exceptions being treason and concealment of pregnancy. The latter was an exception only because the disclosures necessary to accession elided the charge of concealing pregnancy during its whole course. The success of Robert Robertson’s argument would lead to this, that where there had been such a conspiracy, as this case disclosed, the debtor

1885.

---

 No. 87.  
 Robertsons  
 v.  
 Caird.

---

 High Court,  
 Aug. 17.

---

 Suspension.

1885. and his accomplice must be tried on separate libels. (2)  
 No. 87. The second objection would only be good if the alterna-  
 Robertsons v. Caird. tive was truly an alternative, but it was really not an  
 High Court, alternative charge, but only a redundant and alternative  
 Aug. 17. way of stating the *modus*. The thing was the same, and  
 Suspension. it was no more a proper alternative than would be 'six,  
 or otherwise half-a-dozen.'

At advising,—

The LORD JUSTICE-GENERAL.—The indictment before us contains three charges in the major proposition. The first is a common law charge of 'wicked and fraudulent concealment and putting away or disposing of his property or effects by a person insolvent, or on the eve or in contemplation of bankruptcy, for the purpose of defrauding his creditors'; the second is a charge under section 13 of the Debtors (Scotland) Act, 1880, subsection A, No. 3; and the third is a charge under subsection B (5) of the same section. The verdict against both parties is 'guilty as libelled,' and that means that both and each of the panels are guilty of all three offences charged.

As regards the statutory charge, the first provision with which we have to do is, that 'the debtor in a process of sequestration or *cessio*,' shall be deemed guilty of a crime and offence 'if [A (3)] after the presentation of the petition for sequestration or *cessio*, or within four months next before such presentation, he conceals any part of his property. . . .' The other (B 5) is, that he shall be guilty of a crime and offence if, being insolvent, and with intent to defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of or any charge on or affecting his property.

It seems, then, that no one can commit the statutory offence who is not a 'debtor' in the meaning of section 13—that is, in the case of A (3) a person who has been sequestrated or against whom a decree of *cessio* has been pronounced, and, in the case of B (5), a person insolvent.

Now, Robert Robertson was not in the situation con-

templated by either of these definitions. He was not made bankrupt, nor sequestrated, or under decree of *cessio*, nor was he insolvent; and that being so, it is plain that the conviction of Robert under the statutory charge is bad, and as the verdict cannot be split, that disposes of the whole case as against Robert. I give no opinion as to the relevancy of the statutory charge as it is here stated. Against it something appears capable of being said. As to Robert, then, decree of suspension and liberation ought to be granted.

1885.  


---

 No. 87.  
 Robertsons  
 v.  
 Caird.  


---

 High Court,  
 Aug. 17.  


---

 Suspension.

The case of David is in a totally different position. He was bankrupt and a debtor in the sense of section 13, and may be convicted of the common law offence charged, and also under both statutory charges. The difficulty in his case is that there is introduced in the minor proposition of the indictment an alternative. If it is a proper alternative—that is, if the two things with which he is charged are properly inconsistent—the objection is good, because then we have an alternative charge and a general conviction, but I think that so far from being inconsistent that they are substantially the same. The part of the minor which precedes the words ‘or otherwise’ consists of a statement that the accused removed from his own to his brother’s farm a large part of the stock to conceal it from his creditors, and what follows ‘or otherwise’ is just a narrative of the same thing in other words. Now, that *species facti*, thus doubly described, satisfies, as was admitted, both subsection A (3) and subsection B (5). I therefore am for holding that the conviction of David is good.

LORD YOUNG.—I concur in all respects.

LORD ADAM.—I also concur.

The following was the Interlocutor:—

‘*Edinburgh, 17th August 1885.*—Having considered this Bill, and heard Counsel for parties, Pass the Bill as regards the complainer Robert Robertson: Suspend the conviction and sentence complained of by him simpliter, and hereby grant warrant for his immediate libera-



tion ; and as regards the complainer David Robertson, Refuse the Bill, and decern.'

Agent for Complainers—DAVID ROBERTS, S.S.C.  
Agent for Respondent—JAS. AULDJO JAMIESON, W.S.

## WEST CIRCUIT.

### GLASGOW.

Present,

LORDS MURE and M'LAREN.

MESSRS WORRALL, HALLAM & COMPANY, Appellants—*M'Lure*.

AGAINST

JAMES M'DOWALL, Respondent—*A. S. D. Thomson*.

SMALL DEBT COURT—SIST—STATUTE 1 VIC., c. 41, SECS. 15, 16, AND 31 (Small Debt Act, 1837)—DECREE *in foro*—DECREE IN ABSENCE—DECREE BY DEFAULT—SHERIFF—PROCESS.—When both parties have appeared at the first calling of a case in the Small Debt Court, any decree pronounced therein at a future diet, at which one of the parties does not attend, and is not represented is not a decree *in absence*, but a decree by default. Held, therefore, that a sist in a warrant to cite the defender and witnesses, obtained on consignment of expenses decerned for in a decree of absolvitor pronounced on the failure of a pursuer to appear in a small debt action, was incompetent, in respect that the parties to the action had been present at a previous diet in the Small Debt Court, when the case was continued ; that the decree was, therefore, a decree *in foro*, and as such did not fall within the provisions for sisting decrees in absence in section 16 of The Small Debt Act.

1885.

No. 88.  
Warrall,  
Hallam  
& Co.  
v.  
M'Dowall.

Glasgow,  
Aug. 29.

Appeal.

THIS was an appeal to the Circuit Court held at Glasgow, at the instance of Messrs WORRALL, HALLAM & COMPANY, manufacturers, Sheffield, and their mandatories, against a decree of absolvitor pronounced in the Small Debt Court at Paisley (Hugh Cowan, advocate), in an action at their instance against JAMES M'DOWALL, Over-Johnstone, by Johnstone, Renfrewshire, before said Small Debt Court, for £9, 15s. 3d., being amount of account for goods supplied. The case was called before

the Small Debt Court on 9th July 1885, when, on the pursuers' motion, and of consent of the defender, it was continued till Thursday, 16th July 1885. On this latter date the defender appeared personally, but the pursuers failed to appear, and were not represented, and decree of absolvitor was granted in favour of the defender. The pursuers' representative arrived some time afterwards, but nothing could be done. He accordingly consigned the amount of expenses decerned for in the decree of absolvitor as the expenses of the defender and his witnesses, together with five shillings, in terms of section 16 of The Small Debt Act, and obtained a sist, together with a warrant, to cite the defender and witnesses for both parties, which was duly served.<sup>1</sup>

1885.

No. 88.  
Warrall,  
Hallan  
& Co.v.  
M'Dowall.Glasgow,  
Aug. 29.

Appeal.

<sup>1</sup> Statute 1 Vic., c. 41 (The Small Debt Act, 1837).

Section 15.—‘And be it enacted, that any defender who has been duly cited failing to appear personally or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, shall be held confessed, and the other party shall obtain decree against him; and in like manner if the pursuer or prosecutor shall fail to appear personally, or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated, on which account, or account of the absence of witnesses, or any other good reason, it shall at all times be competent to the Sheriff to adjourn any case to the next or any other court day, and to ordain the parties and witnesses then to attend.’

Section 16.—‘And be it enacted, That where a decree has been pronounced in absence of a defender, it shall be competent for him, upon consigning the expenses decerned for, and the further sum of ten shillings, to meet further expenses, in the hands of the Clerk, at any time before a charge is given, or in the event of a charge being given, before implement of the decree has followed thereon, provided in the latter case the period from the date of the charge does not exceed three months, to obtain from the Clerk a warrant signed by him sisting execution till next court day, or to any subsequent court day to which the same may be adjourned, and containing authority for citing the other party, and witnesses and havers for both parties; and the Clerk shall be bound to certify to the Sheriff on the next court day every such application for hearing and sist granted:

1885.

No. 74.  
Warrall,  
Hallan  
& Co.  
v.  
M'Dowall.

Glasgow,  
Aug. 29.

Appeal,

Upon the case being again called before the Small Debt Court on 23rd July 1885, exception was taken to the sist on behalf of the defender, in respect that the decrec of *absolvitor* pronounced in his favour was a decree *in foro*, against which the pursuers were not entitled to be sisted. The Sheriff-substitute sustained the objection, holding that the decree of *absolvitor* not being a decree 'passed in absence,' in the sense of section 16 of the Act, but a decree *in foro* by default, the sist was incompetent, and he again assoilzied the defender, with five shillings of expenses. The pursuers (Messrs Worrall, Hallam, & Company) thereupon lodged the present appeal under section 31 of the Act, and pleaded that the Sheriff-substitute having deviated wilfully in point of form from the statutory enactments has prevented substantial justice from being done, the appeal ought, therefore, to be sustained.

M'LURE, for the pursuer, argued. — This appeal is taken under section 31 of The Small Debt Act, 1837. There was here no *litis-contestation*, and consequently the decree of *absolvitor* was one in absence, and,

---

and such warrant, being duly served upon the other party personally, or at his dwelling place, in the manner provided in other cases by this Act, shall be an authority for hearing the cause ; and in like manner where *absolvitor* has passed in absence of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter, upon consigning in the hands of the clerk the sum awarded by the Sheriff in his decree of *absolvitor* as the expenses for the defender and his witnesses, with the further sum of five shillings to meet further expenses, to obtain a warrant, signed by the Clerk, for citing the defender and witnesses for both parties, which warrant, being served upon the defender in the manner provided in other cases by this Act, shall be an authority for hearing the cause as hereby provided in the case of a hearing at the instance of a defender, the said sum of expenses awarded by the Sheriff, and consigned as aforesaid, being in every case paid over to the other party, unless the contrary shall be specially ordered by the Court ; and all such warrants for hearing shall be in force, and may be served by any sheriff-officer in any county, without endorsement or authority than this Act.'

being in absence, the warrant sisting execution, which was issued by the Sheriff-clerk under section 16 of the Act, was properly issued, and should have been sustained by the Sheriff. At all events, the decree, if not a decree in absence in the ordinary sense, is one which passed 'in absence of the pursuer' in the sense of said 16th section. To hold otherwise would be to narrow unduly the 16th section, which ought to be liberally construed, inasmuch as it provides against the hardship of a pursuer being left without a remedy if he happens, through no fault of his own, to be absent when the case is called. The Sheriff in refusing the remedy provided by the 16th section, has deviated from the statutory enactments, and has thus prevented substantial justice being done. The appeal ought, therefore, to be sustained.

A. S. D. THOMSON, for the defender.—The Sheriff has taken the proper course in refusing to sustain the warrant sisting execution of the decree of absolvitor. The question really is, whether the decree is one *in foro* or one in absence; for section 16 applies only to decrees in absence, and not to decrees *in foro*. This is not a decree in absence in any sense whatever. There has clearly, in the circumstances of this case, been *litis contestatio*, and a decree after *litis contestatio* cannot be a decree in absence. This is a decree by default, and therefore a decree *in foro*. *Lumsdaine v. Australian Company*, 18th Dec. 1834, xiii. Shaw, p. 215. Also *dictum* of Lord Deas in *Rowan v. Mercer*, Ayr, 12th May 1863, [rv., vol. iv., p. 377. The remedy provided therefore by section 16 does not apply to the present case. The tendency, besides, of recent legislation is to discourage delays in procedure, as appears from the Court of Session Act of 1868, and the Sheriff Court Act of 1876. And if this is the tendency in regard to the Superior Courts, much more must it be in regard to the Small Debt Court, which is, for good reasons, peculiarly a Summary Court, and any hardship of a particular case is a mere incident of its summary procedure.

1885.

No. 88.  
Warrall,  
Hallan  
& Co.v.  
M'Dowall.Glasgow,  
Aug. 29.

Appeal.

1885.

No. 88.  
Warrall,  
Hallan  
& Co.  
v.  
M'Dowall.

Glasgow,  
Aug. 29.

—  
Appeal.

LORD MURE.—In the view I take of this case we are strictly tied down by section 31 of The Small Debt Act. There are in that section certain specified grounds of appeal, all of which are admittedly inapplicable in the circumstances of this case, except the one where appeal is made competent when there has been any such 'deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done.' There is here no allegation that the Sheriff wilfully disregarded any statutory form: but the appellant complains of a judgment passed in his absence, he having been late of arriving in Court, at the diet fixed on a previous day for proceeding with the case. His argument is that he is entitled under section 16 of the Act to take out a sist and have the case reheard. This, in point of fact, he obtained from the Sheriff-clerk, but the Sheriff-substitute held that it was incompetent to grant such a sist; and it is argued that in consequence of this decision substantial justice has not been done.

Now it is only when a decree is in absence that a sist can be taken out under the provisions of the 16th section. And that brings us to the question, What is a decree in absence in the sense in which the words are used in that section? And the view I take of the question is that after parties have appeared in Court, and there has been *litis-contestation*, there cannot be a decree in absence on either side. When both have been present and have joined issue—as it is proved by the excerpts from the Minutes of Procedure that they here did—and either party thereafter fails to appear at the next diet then duly fixed, the decree is one by default and not absence.

It has been suggested in argument that this construction does not, strictly speaking, apply to a pursuer. I cannot adopt that view. A decree is in absence of the pursuer when the pursuer does not appear at the first calling of the case; and the defender is then assoilzied.

at is probably what the 16th section contemplates  
 en it is dealing with decrees in absence of a pursuer.  
 t if both parties duly appear at the first calling of the  
 e, the decree can never thereafter be one in absence.  
 the present instance it was one by default, no doubt,  
 t it is in effect a decree *in foro*. On that ground I  
 nk the Sheriff was right in the view he took of the  
 e.

1885.

No. 88.  
 Warrall,  
 Hallan  
 & Co.  
 v.  
 M'Dowall.

Glasgow,  
 Aug. 29.

Appeal.

LORD M'LAREN concurred.

The following was the Interlocutor:—

'*Glasgow, 29th August 1885.*—Having heard Counsel  
 parties, Lord Mure Dismisses the appeal and  
 firms the judgment appealed from: Finds the re-  
 ndent entitled to expenses: Modifies the same to  
 r pounds, four shillings; for which decerns against  
 appellants.'

Agents for the Appellants—MONCRIEFF, BARR, PATERSON & Co., Glasgow.

Agent for Respondent—JOHN ADAM, Writer, Paisley.

Present,

LORD ADAM.

HER MAJESTY'S ADVOCATE—*Wallace, A.-D.*

AGAINST

GEORGE ARMITAGE—*J. Comrie Thomson and Patten.*

CULPABLE HOMICIDE—CULPABLE NEGLIGENCE—DEATH BY POISON  
 ACCIDENTALLY SUPPLIED BY DRUGGIST.—Circumstances in which a  
 chemist and druggist who had accidentally supplied a powder  
 containing *nux vomica* instead of liquorice powder, which was  
 asked for, with the result that the customer died immediately  
 after taking the powder, was found not guilty, by the Jury, of cul-  
 pable homicide.

GEORGE ARMITAGE, chemist and druggist, now or  
 ely residing in or near Newton Street, Greenock,  
 s indicted and accused of the crime of culpable  
 homicide.

No. 89.  
 George  
 Armitage

Glasgow,  
 Oct. 28.

Culp. Hom.

IN SO FAR AS, being a chemist or druggist, carrying on business  
 the shop or premises occupied by you in or near Hamilton Street,

1885. Greenock, and it being your duty, in your capacity of chemist or  
 — druggist aforesaid, to exercise due care and caution in the dispensing  
 No. 89. of drugs and medicine, and having, on the 22nd day of August 1885,  
 George Armitage. or on one other of the days of that month, or of July immediately  
 — preceding, or of September immediately following, in or near the  
 Glasgow, said shop or premises, been requested by George M'Lean, clerk, then  
 Oct. 28. and now or lately residing with John Warden, coal merchant, in or  
 Culp. Hom. near West Burn Street, Greenock, on behalf of his mother, the now  
 deceased Jane Warden or M'Lean, widow, then residing with the  
 said John Warden in or near West Burn Street, Greenock aforesaid,  
 to sell to him or to supply him with a penny worth of the substance  
 commonly known as liquorice powder, being a substance not danger-  
 ous to life, you the said George Armitage did, time and place above  
 libelled, culpably and recklessly, and in culpable violation and neglect  
 of your duty as aforesaid, sell, supply, or dispense to the said George  
 M'Lean, instead of the said liquorice powder, a quantity of powder  
 commonly known as *nux vomica*, containing strychnine, a highly  
 poisonous substance and dangerous to life, the particular quantity  
 so sold, supplied, or dispensed by you being to the prosecutor  
 unknown, but it being a fatal and poisonous quantity, the said  
 powder so sold, supplied, or dispensed by you being enclosed or put  
 up in a piece of paper labelled or marked 'Compound Liquorice  
 Powder, Dose one to two teaspoonfuls in water as required.  
 George Armitage Dispensing Chemist 30 Hamilton Street Greenock,'  
 or similarly labelled or marked, and the said quantity of *nux*  
*vomica* powder so sold, supplied, or dispensed by you, and labelled  
 or marked as aforesaid, having been, time above libelled, or on the  
 following day, delivered by the said George M'Lean to the said  
 Jane Warden or M'Lean, in or near the said dwelling-house or  
 premises in or near West Burn Street, Greenock, for whom said  
 liquorice powder was intended to be purchased, she, on or about the  
 23rd day of August 1885, or the day immediately preceding, in or  
 near the said dwelling-house or premises, after mixing or causing  
 the same to be mixed with water, partook thereof, or of part thereof,  
 and in consequence immediately or soon thereafter died, and was  
 thus culpably killed by you the said George Armitage: And you  
 the said George Armitage having been apprehended, &c.

There being no objection stated to the relevancy, the  
 panel pleaded not guilty, and evidence was led. It  
 appeared that the deceased was a woman in delicate  
 health, being in an advanced stage of consumption, and  
 also had disease of the kidneys, and in the opinion of  
 the medical men would not throw off the effects of a



poisonous dose as a healthy woman would. She had sent for liquorice powder, and instead of that was supplied with *nux vomica*, the active principle of which was strychnine. The panel himself supplied the powder, and it contained 120 grains of strychnine, a much larger quantity than was sufficient to destroy life. There was no dispute as to the fact that the deceased died of strychnine poison from taking the powder supplied by the panel. It appeared that in the panel's shop the bottle containing *nux vomica* had no particular place on the shelves, and frequently stood next to the bottle containing liquorice powder. The bottles were also similar, with a difference in the label, and in gas-light the two powders were very much alike. The *nux vomica* dispensed on this occasion, from its light colour, resembled liquorice powder more than usual. Dr Littlejohn, Edinburgh, and Mr King, city analyst, stated that it was the custom in Edinburgh to keep *nux vomica* apart from medicinal substances to prevent a mistake happening such as had occurred here. The panel was proved to be an experienced chemist, and the medical men who were examined spoke to his character as being of the highest in his profession.

The ADVOCATE-DEPUTE, in addressing the Jury, said. —It was necessary for the safety of the public that cases of this kind should be tried. It was necessary that poisons should be kept separate from ordinary medicines, and the panel himself had stated in his declaration that since the occurrence of the sad event he had rearranged his shop, and placed poisons in a separate place. And assuming that it was a common practice in the West of Scotland not to keep poisons apart, the greater should have been the care in dispensing them. The smell alone would have distinguished the powders. As there had been an amount of carelessness or recklessness which entitled the Jury to return a verdict of culpable homicide, he felt constrained to ask for such verdict accordingly.

1885.

No. 89.  
George  
Armitage.Glasgow,  
Oct. 28.

Culp. Hom.

1885.  
No. 89.  
George  
Armitage.  
Glasgow,  
Oct. 28.  
Culp. Hom.

J. COMRIE THOMSON, for the panel, asked for an acquittal, and contended.—The purpose of the trial as an enquiry had been served. There was here no such gross corrupt and evil intention as is essential to the idea of crime, nor any regardlessness of order and social duty. Hume, vol. i., pp. 21, 22. At the worst there was an unfortunate and excusable error. In the case of *Reg. v. Noakes*, 1866, iv., F. and F., 920, the accused was a chemist, and the deceased dealt with him, and had been in the habit of sending to him for aconite as a liniment. The accused was in the habit of using bottles of a particular colour and shape to contain poison, but on the particular occasion the deceased had sent his own bottles. He had been ordered to take henbane, and to use aconite as a liniment. The accused, through some accident, put the aconite into the henbane bottle, and the deceased took it and died. Chief-Justice Erle did not call on the accused for his defence, stating that ‘they could not convict, unless there was such a degree of complete negligence as the law implied by the word felonious. The verdict was, therefore, not guilty. In the case of *Reg. v. Spencer*, 28th Feby. 1867, x. Cox, C.C. 525. In that case the prisoner was the doctor of the deceased, and gave him a bottle marked to the effect that three spoonfuls should be taken at night. The deceased died of poisoning by strychnine. The prisoner believed it to be bismuth, which is like strychnine. There was no suggestion of bad motive, and Justice Willes told the Jury that a blunder alone would not render the prisoner criminally responsible. There must be gross and culpable negligence as would amount to a culpable wrong and show an evil mind. In that case also the verdict was not guilty. The case the Jury were considering was on all fours with these ; and considering the high character, the long experience, and the reputation for carefulness in business which the prisoner had received, he claimed a verdict of not guilty from the Jury.

LORD ADAM, in charging the jury, said.—‘The Advo-

cate-Depute had most properly brought this case before a Jury, and the law was correctly stated in the indictment, That it was the duty of the accused [reads] 'in your capacity of chemist and druggist to exercise due care and caution in the dispensing of drugs and medicines ;' and the question for the Jury related to the applying that law to the undisputed facts of the case. They had to consider whether or not the prisoner was criminally liable for the consequences of his act in giving *nuxvomica* to the young man instead of liquorice powder, as was asked for. If there was an excusable mistake, there was no crime, but if there was culpable negligence, the prisoner was liable. They were to consider whether the fact that in the hands of even a careful person like the prisoner, the fact that this had occurred did not show that the practice of keeping bottles containing poisons mixed up with other medicinal bottles containing innocuous drugs like liquorice powder was not a dangerous practice, and whether the doing so on the whole circumstances did not constitute a breach of duty by the prisoner, for which he was responsible.

1885.  
No. 89.  
George  
Armitage.  
Glasgow,  
Oct. 28.  
Culp. Hom.

The following was the verdict :—

'The Jury unanimously find the panel not guilty. The Jury recommend that a more distinctive colour or mark be put on all bottles containing deadly poisons by chemists.'

The Court assoilzied the panel simpliciter, and dismissed him from the bar.

Agent—J. PATTEN, W.S.

---

1885.

No. 90.  
Drever &  
Tyre.

High Court,  
Nov. 2

Culp. Hom.  
Neglect of  
Duty.

## HIGH COURT.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE—*The Lord Advocate (Macdonald) and  
Wallace, A.-D.*

AGAINST

WILLIAM DREVER—*Dickson and Salvesen.*

WILLIAM TYRE—*Jamieson and Ure.*

CULPABLE HOMICIDE — NEGLECT OF DUTY BY THE MASTER AND MATE OF A STEAM-VESSEL, CAUSING A COLLISION—SPECIFICATION, WANT OF—FAILURE TO KEEP A LOOK-OUT ON BOARD STEAM-VESSEL—DANGER TO LIFE—RELEVANCY—SEPARATION OF TRIALS.—An indictment which charged the master and mate of a steam-vessel with culpable homicide, or culpable and reckless neglect of duty, set forth that it was the duty of the captain to navigate the vessel with due care and caution, and of the mate to assist the captain therein, and, in particular, to keep a good look-out, yet in breach of these duties they did steer in a reckless manner, and fail to keep a good look-out, with the result that a collision occurred and life was lost. Objection repelled that there was no specification of the precise act which had been done or omitted, and on the doing or not doing of which the Crown proposed to found. At the trial of the master and mate of a steam-vessel, charged with culpable homicide, or culpable and reckless neglect of duty by failing to keep a good look-out, the charge to the Jury was that where a person is charged with a duty involving the safety of human life, he is *criminally* liable only for a notable and serious fault or neglect—or *culpa lata*—and not on account merely of a slight fault or negligence.

Circumstances in which a motion for separation of trials was granted.

WILLIAM DREVER, master mariner, and WILLIAM TYRE, mate or chief officer, were indicted and accused of the crime of culpable homicide ; as also culpable and reckless neglect of duty by any person or persons in charge of or employed on board of a steam-vessel, whereby any of the lieges are put in danger of their lives.

IN SO FAR AS you, the said William Drever, being master of the steamship *Albicare*, of Glasgow, on a voyage from Glasgow to Goth-

enburg, in Sweden, and you, the said William Tyre, being then chief officer of the said steamship, and the said steamship having left the said port of Glasgow on or about the 21st day of August 1885, and having, in prosecution of the said voyage, reached the Sound of Mull early on the morning of the 22nd day of August 1885, and it being the duty of you, the said William Drever, as master, and in command of said steamship, to navigate, direct, manage, and steer it, or cause it to be managed and steered, with due care and caution, and with a due regard to the safety of other vessels, and in particular to keep, or cause to be kept, a good look-out from the said steamship so as to avoid collision with other vessels, and it being the duty of you, the said William Tyre, as chief officer of the said steamship, to assist the said William Drever in the performance of his duties as aforesaid, and in particular to keep, or cause to be kept, a good look-out from the said steamship, so as to avoid collision with other vessels : YET NEVERTHELESS, you, the said William Drever and William Tyre, did, both and each or one or other of you, time last above libelled, in the Sound of Mull, and at a part thereof between the Green and the Gray Islands, one mile or other short distance, in a westerly direction, from the northern point of the entrance to Lochaline, in the parish of Morven, and county of Argyll, or at some other part of the said Sound of Mull, the particular place being to the prosecutor unknown, in breach of your respective duties as master and chief officer aforesaid, navigate, direct, manage, and steer the said steamship, or cause it to be managed and steered in a culpable, reckless, and negligent manner, and without due regard to the safety of other vessels, and did neglect to keep, or cause to be kept, a good look-out from said steamship, so as to avoid collision with other vessels, and in consequence of the culpable and reckless neglect of duty on the part of both and each or one or other of you, as above libelled, the said steamship then under your charge, or in which you were then employed as master and chief officer respectively as aforesaid, did, time and place last above libelled, strike amidship on the port side, or on some other part to the prosecutor unknown, and did sink, upset, or run down the yacht or sailing vessel *Kalafish*, of London, then belonging to the now deceased William Crossman, solicitor, then or lately before residing in or near Camden Square, London, then lying becalmed or drifting slowly along at or near the place last above libelled, and having on board the said William Crossman, the now deceased Mary Mather or Crossman, his wife ; James Nicholson, then master of the said yacht or sailing vessel, and now or lately residing in or near Main Street, Spittal, in the county of the burgh and town of Berwick-upon-Tweed ; George Nesbitt, then mate of the said yacht or sailing vessel, and now or lately residing in or near Main

1885.

No. 90.  
Drever &  
Tyre.High Court,  
Nov. 2.Culp. Hom.  
Neglect of  
Duty.

1885. Street, Spittal, aforesaid ; the now deceased Henry Johnston, seaman on board the said yacht or sailing vessel ; the now deceased David Carstairs, seaman on board the said yacht or sailing vessel ; and the now deceased Hugh M'Farlane, steward on board the said yacht or sailing vessel, by all which, or part thereof, the said William Crossman, Mary Mather or Crossman, James Nicholson, George Nesbitt, Henry Johnston, David Carstairs, and Hugh M'Farlane were all immersed in the sea at the place last above libelled, and the said William Crossman, Mary Mather or Crossman, Henry Johnston, David Carstairs, and Hugh M'Farlane were drowned or otherwise bereaved of life, and were thus culpably killed by you, the said William Drever and William Tyre, or one or other of you, and the said James Nicholson and George Nesbitt were put in danger of their lives through the culpable and reckless violation of duty as aforesaid by you, the said William Drever and William Tyre, or one or other of you : And you, the said William Drever and William Tyre, having been apprehended, &c.

No. 90.  
Drever &  
Tyre.

High Court,

Culp Hom.  
Neglect of  
Duty.

SALVESEN, for Drever, objected to the relevancy.—The charge here is culpable homicide, as also culpable and reckless neglect of duty [reads], and it is said that the panels are 'guilty of the said crimes, or of one or other of them.' We object that the charge of culpable and reckless neglect of duty is not a relevant point of dittay as here libelled. The charge is 'culpable and reckless neglect of duty by any person or persons in charge of or employed on board of a steam-vessel, *whereby any of the lieges are put in danger of their lives.*' In order to constitute a crime punishable by law there must be a result produced or intended. Culpable neglect leading to no result and occasioning no injury does not amount to a substantive offence. *Robert Young*, High Court, 20th May 1839, Swint., vol. ii., p. 376.

LORD YOUNG.—As there is no doubt that in this case there was loss of life, it does not seem to me that the words 'whereby any of the lieges are put in danger of their lives' are of the least importance. Without, therefore, expressing any opinion upon the question raised, I think it would be well to consider whether it is worth while to retain them.

The LORD ADVOCATE.—While I do not admit that there is any validity in the objection, I am quite willing, following upon your lordship's suggestion, if my friends opposite desire it, to move that these words be expunged.

The Court allowed the words to be expunged accordingly.

SALVESEN, for the panel Drever.—We object further that the minor proposition is wanting in specification. The allegation of duty, so far as it goes, is unobjectionable [reads], but in setting forth the breach of duty, something more is necessary than a mere negative of the duty alleged. If it is intended to prove anything else than a mere failure to keep a good look-out, we object to the indictment as insufficient. If a competent man is placed, charged with the duty of keeping a good look-out, and he fails to do so, the owners may be made liable for any loss that may arise from his failure, but the master and the mate cannot be made liable. And if the indictment means that any act of good seamanship, or the like, was neglected, and is to be proved, that should have been specified in order to give fair notice to the panels. *Thomas Henderson and others* (the *Orion* case), High Court, 29th August 1850, J. Shaw, p. 394. In that case the particular mode in which the master and mate there failed in duty is much more specifically set forth. [Reads].

URE, for the panel Tyre.—I adopt the argument on behalf of Tyre in so far as applicable. But his position is peculiar. It is said that Tyre's duty as chief officer of the said steam-ship was 'to assist the said William Drever in the performance of his duties as aforesaid, and in particular to keep or cause to be kept a good look-out,' &c. He is not to take any initiative; the paramount control is to remain with the captain. The chief officer's failure is a failure to assist the captain in the performance of what is specified as the captain's duty; and, if that is so, I should have been told in

1885.

No. 90.  
Drever &  
Tyre.High Court,  
Nov. 2.Culp. Hom.  
Neglect of  
Duty.



1885. what way I failed. In the case of the *Orion* it was  
 No. 90. stated that the captain went below, and that while the  
 Drever & mate was left in control, the vessel was navigated care-  
 Tyre. lessly. If that or any similar act of negligence gave rise  
 High Court, to the unhappy result here, and is to be proved, the  
 Nov. 2. panel was entitled to be told; and if it is to be proved  
 Culp. Hom. that he failed to perform or to assist the captain in per-  
 Neglect of forming any act of good seamanship, we were entitled to  
 Duty. have notice of what is to be proved. In other words, if  
 the charge means more than a charge of failure to keep  
 or cause to be kept a good look-out, the indictment is  
 irrelevant from want of specification.

LORD YOUNG.—I cannot hold the verdict irrelevant. It is difficult to see how it could have been put otherwise. The yacht was run down, and that must have been from neglect of some kind. The Lord Advocate says in the indictment that it arose from failure to keep a good look-out—that if a proper look-out had been kept, and the steamer had been steered accordingly, this accident could not have happened. I think the panels can be fairly tried upon this indictment.

URE, for the panel Tyre, moved that his trial be separated from that of the captain.—It will be a hardship if he is deprived of Drever's testimony. The case will come to turn very much on what was, and what could, in the then state of the weather and other circumstances, be seen from the *Albicore*, and more particularly from the bridge of that vessel, and also upon what were the orders given for the navigation of the vessel upon the occasion immediately preceding the occurrence libelled. And as the only person who was on the bridge of the *Albicore* at the time, besides the captain and the chief officer, is the person who was at the wheel, and he was under cover of the house over the wheel, there will be no one to speak to these facts except the steersman, who, having the light of the compass in his face, from his position could not see, and cannot give any evidence on the point.

DICKSON concurred for the captain, Drever, in making the same motion.

The LORD ADVOCATE.—This motion has been frequently made before, and on the same grounds as here stated, but so far as I am aware, has never been granted for that reason alone. I regret that I cannot consent.

LORD YOUNG.—I think that the motion is reasonable in the circumstances of this case, and I am therefore disposed to grant it. Which of the panels will you try first, Lord Advocate ?

The LORD ADVOCATE.—I will proceed with the trial of the captain in the first place.

The panel William Drever, the captain of the *Albion*, thereupon pleaded not guilty, and his trial proceeded with.

LORD YOUNG, in charging the Jury as to the question of criminal neglect of duty, said.—There are two charges in the indictment, or rather, two names under which one charge is stated. The only one with which we are concerned now is the charge of culpable homicide. The other charge, which is now struck out of the indictment, is ‘ culpable and reckless neglect of duty by any person or persons in charge of or employed on board of a steam-vessel, whereby any of the lieges are put in danger of their lives.’ That, gentlemen, is struck out upon objection, as at least a superfluity, and you will therefore consider that the charge, and the only charge, is that of culpable homicide,—that is, unlawfully causing the death of another ; it don’t signify to the crime how caused. If it is of malice, that is, malice aforethought, to use a technical expression, which has given rise to a great deal of discussion, the homicide is called murder ; but if it is unlawful, that is, caused by unlawful conduct without malice, it is called culpable homicide, and varying in degree of guilt according to the circumstances of the case. And the room for variety in the degree of guilt is very large. Here it is alleged to consist in this, that the prisoner at the bar being in charge of a steam-vessel as

1885.
  


---

No. 90.
Drever &
Tyra.
  


---

High Court,
Nov. 2
  


---

Culp. Hom.
Neglect of
Duty.

1885. master, and, so, charged with the duty of directing the  
No. 90. navigation of the vessel in such a manner as to be  
Drever & reasonably safe, navigated it, or caused it to be navi-  
Tyre. gated in such a negligent or reckless manner as to cause  
High Court, loss of human life. And the negligence or recklessness,  
Nov. 2. or both, which the prosecutor imputes to him, is that he  
Culp. Hom. failed to keep a good look-out. Now, the law upon this  
Neglect of subject undoubtedly is, that any person who is in a situa-  
Duty. tion or charged with a duty which involves the safety  
of human life, must observe care and caution in the dis-  
charge of his duty, or at least an absence of gross negli-  
gence and recklessness. I put it to you in that way,  
gentlemen, because it is not any slight fault or neglect  
which will make a man a criminal ; it must be a notable  
and serious fault or neglect by a man upon whose care  
and caution the safety of human life depends. I say  
notable and serious. The Latin expression is *culpa lata*,  
not any slight fault or negligence, but *culpa*, which we  
would translate fault, and *lata*, which I would venture  
to translate to you as notable or serious as distinguished  
from slight and trivial. Now, the question for you to  
consider in the evidence that has been led before you is,  
whether fault of that character has been established  
against the prisoner ? Did he neglect or violate reck-  
lessly in a notable and serious manner the duty which  
was incumbent on him as master of this ship ? It is  
very much to the credit of those who are charged with  
the navigation of ships that accidents of this description  
are in the experience of this Court very rare indeed.  
Ships are usually navigated with great care and caution,  
and the occurrence of a calamitous accident such as oc-  
curred here on that August night, or morning, caused a  
great sensation. A little yacht of thirty-six tons, with  
the owner and his wife on board, is suddenly run into  
and sunk, and they are drowned, and two or three of the  
crew are also drowned. It is hard to understand that such  
an accident could have occurred in reasonably good weather,  
on a comparatively (at least) clear night—for I think that

is the import of the evidence—in the month of August, without fault somewhere, although the fault may not be of such a character as will import crime. For we have to consider—and that was not put too strongly to you by the Counsel for the prisoner—that this is a Criminal Court, in which the criminal law of the country is administered—that is to say, the law by which offences are chastised and punished. We are not considering any civil claim for reparation or otherwise. That remains behind if there are any grounds for it. We are considering the question of crime or not crime such as the law punishes, on the part of the master of the steamer. We have had more cases of this class in connection with railway travelling. There is a good deal more of it in that department of commercial life. Such accidents and such charges are due to an absence of care or caution on the part of an engine-driver or somebody charged with the conduct of the train, or of a pointsman or of a signalman who may have neglected or violated a particular duty. The consequence may be and frequently is a great loss of human life. In such cases, where any one in charge has got drunk, or been absent from the scene of his duty, attending to his own ease, or pursuing his own amusement—in short, doing something else than, and neglecting, his duty—that one is chargeable with and punishable for a criminal offence. I say there have been many cases of that description. The law esteems such neglect or such absence from duty as crime. But I have always felt somewhat strongly that it is hard to impute crime, and it will require exceptional circumstances to impute crime, to a man who is present at his post, on the spot where his duty requires him to be, attending to his duty to the best of his ability and to nothing else. Now, whatever doubts there may be about this case—and there are perplexing questions about many of the details—it seems to be beyond doubt that the captain of this ship, who is now at the bar, was at his post and attending to his duty, certainly attending to nothing else, and

1885.

No. 90.  
Drever &  
Tyre.High Court,  
Nov. 2.Culp. Hom.  
Neglect of  
Duty.

1885.

---

No. 90.  
Drever &  
Tyre.

---

High Court,  
Nov. 2.

---

Culp. Hom.  
Neglect of  
Duty,

---

having nothing else indeed that he could attend to. He was walking up and down in the customary way at his end of the bridge, the mate, whose duty it was, being at the other end looking ahead and prepared to give orders according the best of his judgment and ability as circumstances may arise. He was not even sitting. He was in every respect wide-awake, night-glass in hand, or at hand if there should be occasion to use it. Now, in such circumstance it seems somewhat inconsistent, to begin with, to charge him with a gross neglect of duty. The ship was, besides, well appointed under his charge, the proper watch was on deck at the time of the collision, and there was a man stationed in the fore-castle to keep a good look-out. This man is not alleged to be an improper man for the post. According to the evidence he was there attending to his duty and to nothing else. He was at his post, not taking his ease, or repose, or amusing himself in any way. He was in the fore-castle looking out ahead. I have already named the mate who was along with the captain on deck, on the bridge, and he would have been alone but for what appears to be a special duty of the captain of a ship in going through narrows. It was the mate's watch, but the interests of safety, for the promotion of which this prosecution has been instituted, require that in going through narrows such as the Sound of Mull, the captain also should be upon duty, that is, he should be with the mate on the bridge. Accordingly they were both there. The captain saw that the mate was there, and he was there himself. There was another man on deck, Scotland, the carpenter. It was his duty also to be wide-awake or ready to answer at a moment's call in case anything should be needed. The rest of the crew had gone to their berths. The lights were all burning brightly, and the ship was going at her usual speed. It struck me as being according to the evidence, but you are the proper judges, that she was going at no excess of speed, having regard to the place and the weather. Going at an undue rate of speed, having regard to the place and the weather,

has no regard, therefore, to this case. Some questions were put to the mate, suggesting that as it was dark and hazy, that was a reason for going at a less speed. You quite understand, gentlemen, that I rely upon your judgment in the matter, and do not ask you to take mine—at least I am not obtruding it upon you—but it appeared to me that upon such a night, when the lights of a large vessel were visible at a distance of five miles, and those of a small yacht could be seen at two, it was quite according to custom and reasonably safe for a steamer to go at full speed.

But then it is said that if the captain had kept a due look-out he must have seen this unfortunate yacht—that the fact of the yacht having been run down is itself proof; if it is not, then there is no other—that the captain who was at his post did not keep a good look-out. He posted a competent man on the forecastle to keep a good look-out; he had the mate on duty at the proper place; and he himself was also attending to the navigation of his ship. Well, notwithstanding that apparent sufficiency of care, it is put to you, and not unfairly, that the accident could not have happened if these men had done their duty in that or in all respects. That brings us to the question, How was this yacht appointed upon that night? For it is the safety of those on board that yacht which was sacrificed, and whose sacrifice has occasioned this very proper enquiry. For nothing can be more proper than the enquiry. It is simply an inquest into the circumstances attending this most calamitous accident involving such loss of life. And we must consider how the yacht was appointed. The steamer was, so far as I can see, all right. She was rightly appointed, rightly lighted, and the proper watch was on board. Every man, so far as one can see, was attending to his duty. If there was anything wrong it was the human infirmity of a man doing his best, not having seen in time what it is such a misfortune that he did not. What was the case as regards the yacht? Undoubtedly when the crew or those on board went to

1858.

---

No. 90.  
Drever &  
Tyre.

---

High Court  
Nov. 2

---

Culp. Hom.  
Neglect of  
Duty.

1885.

---

No. 90.  
Drever &  
Tyre.

---

High Court,  
Nov. 2.

---

Culp. Hom.  
Neglect of  
Duty.

bed the yacht was not lighted as it ought to have been. The law was transgressed by those in charge of her, for according to statute law the lights should have been up. They ought to be up from sunset to sunrise—that is, at that season of the year, from a little before half-past seven to an early hour in the morning. But no lights were put up on this yacht. They all retired to bed except the captain and someone else who remained on duty with him. The captain and someone, whose name I forget, remained on duty until midnight. There were no lights then. Other two men came on duty at twelve o'clock to take their turn. The man Nesbitt, who was the first witness examined, came to take his turn at that time, and a man named Carstairs. The captain and the other man then went down to their berths. There were no lights at that time. Now, I must say it is a strange thing, but you will exercise your judgment on it, that the yacht should be in this state, and that it never should have happened before—at least I understand them to say that. The captain goes down at twelve, and he tells Nesbitt, at his leisure, to light the lamps. He said he left it to his discretion ; speaking in the most matter-of-fact way. Nevertheless, according to his testimony, such a thing never happened before. It was quite wrong, and subjected him and probably others to a punishment for neglecting a duty imposed by law upon them, not only for their own safety but for the safety of others. Because running into the yacht is perilous, not to the yacht only, but to the vessel which runs upon her. It may not of course happen to be a big steamer like the *Albicare*, where the whole calamity fell upon the yacht. It concerns the safety of human life that those navigating those seas should observe the regulations. Now, they were not observed on board that yacht, at all events up to half-past twelve o'clock on the night in question. And no account whatever is given of that neglect except that the captain says it was such a nice night and such a quiet place. Well, the evidence



seems to point to this, that it is rather a dark place. I suppose there is no more familiar description of the Sound of Mull than the words by which our poet describes it—'Mull's dark Sound.' It is evidently a dark Sound. The accuracy of the description was pretty generally recognised by those who have gone through the Sound. I must say I was struck by the evidence of the man who was in charge of the other yacht, called, I think, the *Nonpareille*. He had gone across from Salen, which is on the Mull side, to the Morvern shore to fish. He came back about one o'clock in the morning. He embarked with another man in a row-boat about the time, and he is very particular about the time, because he says the gentleman who was with him struck a light to look at his watch. At this time he says a yacht, answering very much the description of the yacht in question, was in the Sound. That witness says that it was a clear enough night—that is to say, clear enough to see a light or lights—and he could see the mast-head light of his own vessel some two miles off where she lay at Salen. He says further, You could have seen the lights of a steamer five miles off, and the lights of a yacht at a distance of two miles, probably more. Otherwise, he says, it was a dark night, and it was a dark place, and he adds that although there was a moon at that time—for the moon did not set behind the hill-tops till about half-past one o'clock—they would not have seen the yacht at all but that there was a sudden burst of moonlight through a break in the clouds, which, lighting upon the sails of the yacht, enabled them to get a glimpse of her. But he saw no lights, and his opinion was, it was a very unsafe thing for a yacht to be sailing there without lights, for he said another vessel would be down upon her before they could know. That is the evidence of one witness, and there is certainly more evidence in that direction.

Now, that was at one o'clock, and there were no lights then on board the *Kalafish*. This was no doubt the the same yacht, for there is no appearance of any other.

1885.

No. 90.  
Drever &  
Tyre.High Court,  
Nov. 2.Culp. Hom.  
Neglect of  
Duty.

1885.

No. 90.  
Drever &  
Tyre.High Court,  
Nov. 2.Culp. Hom.  
Neglect of  
Duty.

It was a dead calm, and although the yacht had sails up she could make no way. She certainly would go very slowly indeed down to Loch Aline, and would reach it probably in a few hours, even in a dead calm, if she could only get as much way on as would give her steerage power. At all events, there were no lights then according to this witness. Then the look-out man on board the steamer swears most distinctly that there were no lights on board the *Kalafish* or he must have seen her sooner. The carpenter, Scotland, swears the same thing. Now, the question is, Would not that account for the calamity? Certainly it was a calamity which was designed by nobody. That circumstance might account for it, but I am unable to account for it on the assumption that there were lights on board the *Kalafish*. That, however, is for you to consider. At all events, it is according to the evidence that lights would have been seen for at least two miles. There is not a dissenting voice to the contrary of that. It is very difficult to account for the accident on any other footing. There is the captain on the bridge, the mate beside him, and the look-out on the forecastle, and the carpenter, Scotland, all on the deck of the steamer, and all wide-awake, and they all failed to see the lights of the *Kalafish*. There is one witness who says the lights were there, and only one. You have all these men who say there were no lights, and but one witness who says they were there. Certainly he cannot be mistaken in the matter. The Lord Advocate says it is something worse than a mistake on the one side or the other. Nesbitt says the lights were put up at half-past twelve o'clock. The question is, Have you confidence in what he says? There is a great body of testimony the other way. He says he put up the lights at half-past twelve, and he cannot be mistaken. It must be a falsehood on his part if he did not. Now, do you think it safe to rely upon that, and say that all the witnesses who say there were no lights were mistaken—that the captain, the mate, the look-out, the carpenter are all wrong, and seemingly

neglected the only duty for which they were there, and in attending to which they looked after nothing else. If there were no lights this most calamitous accident would become intelligible, and the account of it would be very much what the captain of the *Nonpareille* makes it, namely this, that the schooner yacht which he saw going down without any lights might be run into by a steamer which very probably with even the strictest look-out might not see her in time to escape her. There is a witness very much accustomed to navigate the Sound, William Taylor, one of the last witnesses, whose evidence is of some moment. He has been through the Sound of Mull once every week during these three years. He says the dark shadow of the hills in that narrow channel will prevent one seeing the hull of a vessel at night. He adds it would be safe to go through the channel at night if the lights are visible a mile or a mile and a-half. Here they were visible for two miles. He also affirms that there at Salen there is no daybreak at three o'clock when the sun rises at five o'clock.

Now, I said at the outset that it did not occur to me that I could usefully detain you long or profitably in this case, which is eminently a case for your judgment and consideration. If you think the yacht was lighted, although the lights were put up only at that late hour—if you think that the captain, although there for the purpose of attending to his duty and having nothing else that he could attend to—not reposing or amusing himself, and apparently acting in conformity with the character he had gained from his employers during five years of steady service—if you think it according to the evidence that he was negligent or reckless upon this occasion, you will say so. If, on the other hand, you think that it is not established, and that the accident must be otherwise accounted for, and that you are not prepared to impute crime to him, your proper course will be to find that he is not guilty.

Verdict—Not guilty.

Agents for Drever—Messrs J. & J. ROSS, W.S.

Agents for Tyre—Messrs BOYD, JAMESON, & KELLY, W.S.

1885.

No. 90.  
Drever &  
Tyre.

High Court,  
No. 2

Culp. Hom.  
Neglect of  
Duty.

Present,

LORD YOUNG.

HER MAJESTY'S ADVOCATE.—*The Lord Advocate (Macdonald)*  
and *Blair, A.-D.*

AGAINST

PATRICK SLAVEN.—*Mac Watt.*

JOHN WILLIAMS.—*Craigie.*

MATTHEW TRAILL.—*A. J. Young and Gardiner.*

CULPABLE HOMICIDE—INTENT—*MODUS*—SPECIFICATION — RELEVANCY.—Three panels were charged with assault with intent to ravish, and also with culpable homicide. The charge of culpable homicide was to the effect that, immediately after the assault with intent to ravish, the woman who had been assaulted having risen and endeavoured to escape by running in the direction of a precipice, the panels, all and each, or one or more of them, did 'follow after and pursue' her to or near the edge of the precipice, and she did, 'while endeavouring to escape from' their pursuit, fall over the precipice and was killed.—Objection repelled that the charge was irrelevant in respect that no felonious intent in following after and pursuing was libelled, and that it was not specified that the falling over the precipice was the consequence of the following after.

1885. PATRICK SLAVEN, JOHN WILLIAMS, and MATTHEW  
TRAILL, now or lately prisoners in the prison of Edinburgh, were indicted and accused of the crime of assault, especially when committed with intent to ravish; as also culpable homicide. The indictment after setting forth in the minor two acts of assault, with intent to ravish, committed at two places in the Hunter's Bog, Queen's Park, Edinburgh, contained the following charge:—

No. 91.  
Patrick  
Slaven  
and Others.  
High Court,  
Nov. 17.  
Assault, with  
Intent.  
Culp. Hom.

FURTHER (3.), time above libelled, and immediately after the assault with intent to ravish her last above libelled, the said Margaret Lindsay Cunningham having, at the place last above libelled, risen from the ground, and endeavoured to escape from you the said Patrick Slaven, John Williams, and Matthew Traill, or one or more of you, by running in the direction of the Salisbury Craigs after mentioned, you the said Patrick Slaven, John Williams, and

Matthew Traill did, then and there, all and each, or one or more of you, follow after and pursue the said Margaret Lindsay Cunningham to or near to the edge or brow of the rocks or craigs commonly called or known as the Salisbury Craigs, situated in the Queen's Park aforesaid, and the said Margaret Lindsay Cunningham did, while endeavouring to escape from the pursuit of you the said Patrick Slaven, John Williams, and Matthew Traill, or of one or more of you, fall over the edge or brow of the said rocks or craigs commonly called or known as the Salisbury Craigs, on to the ground at or near the road or path in the said Queen's Park commonly called or known as the Radical Road, running under the brow of the said Salisbury Craigs, at a part of said Radical Road 200 yards or thereby from the northern termination thereof, a depth of 140 feet or thereby, by all which, or part thereof, the said Margaret Lindsay Cunningham had her skull and pelvis fractured, and received mortal injuries, whereof she immediately or soon thereafter died, and was thus culpably bereaved of life by you the said Patrick Slaven, John Williams, and Matthew Traill, or by one or more of you: And you the said Patrick Slaven, John Williams, and Matthew Traill having been apprehended, &c.

1885.

---

 No. 91.  
 Patrick  
 Slaven  
 and Others.

---

 High Court,  
 Nov. 17.

---

 Assault,  
 with Intent.  
 Culp. Hom.

MACWATT, for the panel, objected to the relevancy of the third charge, in respect *first*, that the words 'follow after and pursue' did not of themselves imply a criminal act.—There might be a lawful following after and pursuing. That being so, the indictment should have stated either that the panels 'wickedly and feloniously' pursued, or that the pursuit was with some criminal motive. The motive was left to be inferred. *Second*. The fall over Salisbury Craigs was not stated to be the immediate consequence of the pursuit, nor was that the necessary inference from the facts libelled. If the pursuit was not the immediate and proximate cause of the fall, and it was not so stated, then there was no relevant charge. It was not even said that the pursuit was continuous.

LORD YOUNG.—I think it unnecessary to call for any reply to this objection. I am quite satisfied with the relevancy of the charge. It is simply and in substance this, that these three men had assaulted the woman in a lonely place in the way described, and she having managed to escape so far from them, they pursued and tried

1885.

No. 91.  
Patrick  
Slaven  
and Others.

High Court,  
Nov. 17.

Assault,  
with Intent.  
Culp. Hom.

to overtake her, and that while thus endeavouring to escape, and they trying to overtake her, she fell over the precipice and was killed. If these statements are all proved, I should not think it clear that the evidence did not amount to murder, but I am quite clear it would amount to culpable homicide; because, if the woman met her death in endeavouring to escape from the assault of these men, then her death was the consequence of their unlawful and violent conduct towards her.

The objection having been repelled, and the libel found to be relevant, the panels pleaded not guilty, and the trial proceeded.

The Jury unanimously found the panels guilty as libelled, and they were each sentenced to seven years' penal servitude.

---

Present,

LORD CRAIGHILL.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. (Robertson) and Blair, A.-D.*

AGAINST

HENRY WATSON—*Chisholm.*

STATUTE 48 AND 49 VIC., c. 69, SECS. 5 AND 9 (Criminal Law Amendment Act, 1885)—UNLAWFUL KNOWLEDGE OF A GIRL UNDER SIXTEEN—CONVICTION UNDER STATUTE NOT SET FORTH IN INDICTMENT.—Held that the words, 'unlawfully and carnally knows,' in the 5th section of the Criminal Law Amendment Act, are equivalent to, has illicit intercourse with, and therefore that knowledge of a girl above thirteen and under sixteen years of age, by anyone who is not her husband, is unlawful carnal knowledge of her in the sense of said section.

92.

Henry  
Watson.

High Court,  
Dec. 15.

Held that a Jury may, by virtue of the provisions of the 9th section of the Criminal Law Amendment Act, 1885, convict a panel of an offence under the 5th section of that statute, notwithstanding that the indictment does not set forth that statute.

Stat. 48 & 49  
Vic., c. 69,  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

HENRY WATSON, from the prison of Linlithgow, was indicted and accused of the crime of 'rape; as also assault, especially when committed with intent to ravish.' There

was no reference made in the indictment to the Criminal Law Amendment Act, 1885. The minor contained two charges of rape, with an alternative to each charge of assault with intent to ravish, in which it was set forth that the panel did 'attack and assault Helen Gibson, a girl then between fourteen and fifteen years of age or thereby, or otherwise under the age of sixteen years.'

1885.

No. 92.  
Henry  
Watson.High Court,  
Dec. 15.Stat. 48 & 49  
Vict., c. 69,  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

The SOLICITOR-GENERAL, in addressing the Jury, asked a verdict of the crimes charged, but that if they came to be of opinion that the rape or assault as libelled had not been proved to their satisfaction, he asked that they should then and in that event return a verdict against the panel of being guilty of a misdemeanour under section 5 of the Criminal Law Amendment Act 1885 (48 and 49 Vict., c. 69). The expression, 'unlawfully and carnally knows,' in that section meant, it was contended, connexion had by any one not the husband of the girl—in other words, illicit connexion; and although the statute was not referred to or set forth in the indictment, it having been set forth that the girl was under the age of sixteen, that was sufficient notice to the accused; and the enactment in section 9 of the Act clearly contemplated that on failure to obtain a verdict of rape or assault, the Jury, while they found the panel not guilty of those crimes, might proceed to find him guilty of an offence under section 5 of the Act. [Reads section 9 of 48 and 49 Vict., c. 69.]<sup>1</sup>

<sup>1</sup> Statute 48 and 49 Vic., cap. 69 (Criminal Law Amendment Act, 1885).

Section 5.—'Any person who (1) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge, of any girl being of or above the age of thirteen years and under the age of sixteen years, . . . shall be guilty of a misdemeanour, and being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that it shall be a sufficient defence to any charge under sub-section 1 of this section, if it shall be made to appear to the Court or Jury before whom the charge shall be brought that the



1885.

No. 92.  
Henry  
Watson.

High Court,  
Dec. 15.

Stat. 48 & 49  
Vict., c. 69,  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

CHISHOLM, for the panel, on the points raised, contended.—That unlawful carnal knowledge in section 5 of the Act must mean something more than was contended for on behalf of the Crown. It could not be said, for instance, that the section was intended to extend to the case of an adulterer, whose paramour happened to be a married woman of fifteen. Further, it was the duty of the prosecutor, it was submitted, to libel the statute in the major proposition, as being a statute of recent date, and altering the common law. It was not sufficient merely to set forth that the girl was of the age specified in the statute. Such a mode of libelling was not warranted by our criminal practice (Hume ii., p. 166 ; Alison ii., p. 228), and there is nothing in the Criminal Law Amendment Act, or especially in section 9 thereof, to derogate from our law. The procedure, without previous announcement, was unfair to the panel. If he had had notice given him, he might have led evidence to show that he fell within the exception annexed to the 5th section, viz., that he had reasonable cause to believe that the girl was of or above the age of sixteen, and might also have adduced himself as a witness under the 20th section of the statute. He therefore asked that the Jury be directed that it was incompetent for them to return a verdict under section 5 of the statute.

---

person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.'

Section 9.—'If upon the trial of any indictment for rape, or any offence made felony by section 5 of this Act, the Jury shall be satisfied that the defendant is guilty of an offence under section 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in any such case, the Jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault.'

LORD CRAIGHILL charged the Jury (after recounting the evidence as to the facts).—These are all the observations which for your guidance and direction I think it necessary to offer to you on the charges in this indictment. You will give these charges, the evidence adduced, and all that has been said by Counsel, your most serious consideration; and having deliberated, you will make up your minds. Should you come to think that the prisoner is guilty of rape, you will so find; if of the alternative of assault with intent to ravish, you will so find.

But if with regard to both charges you are dissatisfied with the evidence, the prisoner cannot be convicted on either, but must be acquitted of both. In this last case, however, the Counsel for the prosecution has submitted as matter of law, on which of course you will follow my guidance, that another charge, one created by the Criminal Law Amendment Act of 1885 (48 and 49 Vic., cap. 69), passed so recently as the 11th of August last, will, in conformity to the 9th section of that statute, be laid before you, to be taken up by you in the light of the evidence that has been led, and a verdict upon it returned just as if this offence, like the charges which I have already referred to, had been set forth in so many words in the indictment. This may be thought by many on its first announcement to be a startling proposal. For to try a man upon a charge not in the indictment upon which he has been asked to plead, and upon which his case has been sent to a Jury, undoubtedly seems at variance with the rules by which hitherto the claim of a prisoner to a fair trial has been protected. The nearest approach to such a thing, and that stops a far way off, is our practice in a trial of murder. There, though the lesser crime of culpable homicide is not mentioned, and there is not a single word in the indictment which suggests that there is to be a trial of anything but murder, it is, and long has been, an alternative covered by the greater charge of murder. But this is the solitary exception, if it be an exception, and few, I suppose, would regret were it so to remain.

1885.

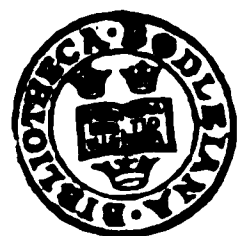
No. 92.  
Henry  
WatsonHigh Court,  
Dec. 15.Stat. 48 & 49  
Vic., c. 69  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

1885.

No. 92.  
Henry  
Watson.High Court,  
Dec. 15.Stat. 48 & 49  
Vic., c. 69,  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

What is said, however, on the part of the prosecution is, that by sec. 9 of the Criminal Law Amendment Act of 1885, any of the offences there referred to may or indeed must be taken up on a trial for rape or assault with intent to ravish, should the Jury be dissatisfied with the evidence as warrant for a conviction upon either, in the same way as it would have been had such statutory offence been libelled as a minor alternative in the ordinary way.

This view, however, naturally and most ably was contested by the Counsel for the prisoner, on the ground of surprise, and on the still stronger ground of alleged hardship. Well, as to the former, the surprise felt by those who had read the indictment, and particularly the words in which Helen Simpson's age is specified, viz., 'a girl then between fourteen or fifteen years of age, or thereby, or otherwise under the age of sixteen years,' and who had read with any attention the ninth and fifth clauses of this Act of Parliament, could not be very great; for something like what has been proposed, if not the very thing itself, might have been suspected to be within the meaning and purpose of the provisions of the statute which the prosecution has invoked. But while this is true, undoubtedly the proposal is a novelty, and but for recent legislation could not have been anticipated. The allegation of hardship is a more serious consideration, but on this occasion there seems to be little cause for apprehension on that score. The only point on which conceivably it might have been necessary to make special preparation for the defence was the age of Simpson, the female mentioned in the indictment. Was she over thirteen and less than sixteen years of age? But the prisoner in his declaration says he knew her age, which was between fourteen and fifteen; and, that being the fact, there could be nothing for which on this part of the case there could be any necessity for special preparation. Again, it was said that by sec. 20, the prisoner is made a competent witness, and had his Counsel known earlier he



might have put his client into the box ; but may he not yet be examined should that be desired by the prisoner ? The contrary is merely an assumption, and if at any time in the course of the trial, after it is known that a statutory charge is to be submitted to the Jury, the prisoner shall come forward as a witness upon that charge, after the case for the prosecution has been closed, the ruling which I am about to give will be given without prejudice to his right to be examined.

1885.

No. 92.  
Henry  
Watson.High Court,  
Dec. 15.Stat. 48 & 49  
Vic., c. 69,  
secs. 5 & 9,  
Criml. Law  
Amend. Act,  
1885.

The question then is, Am I to direct you to take up and give your verdict on the charge which is the subject of sub-section 1 of section 5 of the Act in the event of your not being satisfied that the prisoner is guilty of the offences specified in the indictment. This has been to me a matter of much anxiety, more especially as the present is the first occasion on which the 9th clause has been presented for judicial determination. But the conclusion which I have come to is, that I must follow the course that has been pointed out by the Solicitor-General. This clause is in the following terms—[reads clause]. As a whole it seems to me to be unambiguous, and the concluding words, which say that the prisoner ‘shall be punished in the same manner as if he had been convicted on indictment for such offence as aforesaid, or of the misdemeanour or indecent assault,’ are such as to my mind preclude the opposite construction.

You will therefore, if you are not satisfied that the prisoner is guilty of rape or of assault with intent as libelled, take up and give a verdict on the question whether he is guilty of the statutory offence created by subsection 1 of section 5 of the Criminal Law Amendment Act, 1885, which enacts that ‘any person who unlawfully and carnally knows or attempts to have carnal knowledge of any girl, being of or above the age of thirteen years or under the age of sixteen years, shall be guilty of a misdemeanour.’ What does this mean ? you will naturally—indeed necessarily—ask. The answer you will take from me as the Judge upon

1885.

No. 92.  
Henry  
Watson.High Court,  
Dec. 15.Stat. 48 & 49  
Vic., c. 69,  
secs. 5 & 9.  
Criml. Law  
Amend. Act,  
1885.

this trial. The difficulty arises from the use of the word 'unlawful,' of which the statute gives no definition. What one would at first infer is that unlawful carnal knowledge—knowledge of a female between the ages here specified—is carnal knowledge against the will of the woman. But what is said by the prosecutor to be the true interpretation ignores consent altogether. There cannot be a rape if there be consent; there may, however, as the prosecutor contends, be an offence under the portion of the Act referred to, even where consent has been given. This I feel to be a strange and anomalous conclusion, for hitherto in Scotland a female over twelve years of age has been mistress of her person; but nevertheless such is my reading of the clause, and, so far as I can see, it is the only one which, having in view all the provisions in which the word 'unlawful' occurs, can reasonably be adopted. Whether this innovation be an improvement many probably may be disposed to doubt; but we must take things as they are. The Act is said to have been passed in a panic; but be this as it may, legislation passed in a panic is still legislation, and Judges and Juries alike must aid in its administration. You therefore will understand, taking the law on the subject from me, that unlawful carnal knowledge is neither more nor less—where the woman is over thirteen and under sixteen years of age—than carnal knowledge by one who is not her husband. That is unlawful carnal knowledge within the meaning of the Act; and this is the interpretation on which you will proceed should it be necessary for you to take this matter into consideration. My duty as I view the case has now been done. You are about to enter on yours. Should you think that rape or assault with intent is established, you will return your verdict to that effect, and need consider nothing further; but if you are not satisfied that the prisoner is guilty of one of those, then you will consider whether on the evidence the charge of unlawful carnal knowledge, as these words have been explained

by me, has been proved. If in your opinion it is proved, say so ; if not, or if you doubt whether it is, you will acquit the prisoner.

The Jury found the panel guilty of rape as libelled, and he was sentenced to ten years' penal servitude.

1885.

No. 92.  
Henry  
Watson.

High Court,  
Dec. 15.

Stat. 48 & 49  
Vic., c. 69,  
secs. 5 & 9.  
Crimn. Law  
Amend. Act,  
1885.

Present,

THE LORD JUSTICE-CLERK.

LORDS YOUNG and CRAIGHILL.

FRANCIS HENRETTY, Appellant—*Brand*.

AGAINST

JAMES NEIL HART, Respondent—*Gloag and Wallace*.

STATUTE 16 AND 17 VIC., c. 119 (The Betting Act, 1853), SEC. 3—STATUTE 37 VIC., c. 15 (The Betting Act, 1874)—BETTING IN HOUSE, OFFICE, ROOM, OR OTHER PLACE—LIABILITY OF THE OWNER OF THE GROUNDS.—Section 3 of The Betting Act, 1853, extended to Scotland by The Betting Act, 1874, enacts that 'any person who, being the owner or occupier of any house, office, or room, or other *place*, shall knowingly and wilfully permit the same to be opened, kept, or 'used by any other person' for the purpose of betting, shall be liable in certain penalties.

The appellant was the proprietor of the Shawfield Recreation Grounds, twenty acres in extent, which were used for racing, and large numbers of the public were accustomed to go there, and among them a betting man (M'Gibbon), with whom numbers of the public made bets, and with the knowledge of the proprietor. A complaint was raised against the latter, charging him with an offence against sec. 3 of The Betting Act, 1853, in respect the Recreation Grounds was a 'place' in the sense of the statute, of which he was the owner, and in which he allowed persons to bet. Held, *dissenting* Lord Craighill, (1) that the grounds were not a 'house, office, room, or other place' within the meaning of the Act ; and (2) even if the grounds were such a place, the proprietor was not liable under the Act as having permitted betting, notwithstanding that he saw betting being carried on by a professional bookmaker who had come in along with the rest of the public, and did not take means to stop it.

No. 93.  
Henretty  
v.  
Hart.

THIS was an appeal from the Sheriff Court at Glasgow, upon a Case stated under the Summary Prosecution Appeals Act, at the instance of FRANCIS HENRETTY,

High Court,  
Dec. 17.

Appeal.

1885.

No. 85.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

tenant and occupant of the enclosed grounds known as Shawfield Recreation Grounds, in the parish of Govan and county of Lanark, against a conviction and sentence pronounced in said Court (D. D. Balfour, Sheriff-Substitute) at the instance of the respondent as Procurator-fiscal, convicting the appellant under the 3rd section of The Betting Act, 1853 (16 and 17 Vic., c. 119), of having knowingly and wilfully permitted said grounds to be used for the betting libelled in a complaint under The Summary Jurisdiction (Scotland) Acts, 1864 and 1881, which set forth—

That Henretty had ‘been guilty of an offence within the meaning of The Betting Act, 1853, as extended to Scotland by The Betting Act, 1874, particularly section 3 of said first-mentioned Act, in so far as, it being provided by section 1 of said first-mentioned Act as follows, viz.—“No *house, office, room*, or other place shall be *opened, kept, or used* for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of, or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving, by some other person, of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law;” and, by section 3 of said first-mentioned Act, it is provided as follows, viz.—“Any person who, being the owner or occupier of *any house, office, room, or other place*, or a person using the same, shall *open, keep, or use* the same for the purposes herein-before mentioned, or either of them, and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them, and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes afore-



said, or either of them, shall, on summary conviction thereof, before any two Justices of the Peace, be liable to forfeit and pay such penalty, not exceeding £100, as shall be adjudged by such Justices, and may be further adjudged by such Justices to pay such costs attending such conviction as to the said Justices shall seem reasonable ; and on the non-payment of such penalty and costs, or, in the first instance, if to the said Justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months : ”

And the said Francis Henretty being, on or about 9th April 1885, the occupier of the enclosed grounds called or known as Shawfield Recreation Grounds, situated in the parish of Govan and county of Lanark, and being a place within the meaning of the said first-mentioned Act, did, on or about said 9th April 1885, knowingly and wilfully permit said grounds to be used by Thomas M’Gibbon, otherwise Gibbons, dealer, now or lately residing in or near Bridgegate, Glasgow, for the purpose of there betting with persons resorting thereto, and more particularly by then and there knowingly and wilfully permitting the said Thomas M’Gibbon, otherwise Gibbons, to stand on a hand-cart and bet with the following persons, or one or more of them, as follows, viz :—[There was here set forth the particulars of three separate bets, taken by three persons designed with the said Thomas M’Gibbon.] Whereby the said Francis Henretty is liable, on summary conviction, to forfeit and pay such penalty, not exceeding £100, as shall be adjudged by your lordship, and may be further adjudged by your lordship to pay such costs attending such conviction as to your lordship shall seem reasonable, and, on the non-payment of such penalty or costs, or in the first instance, if to your lordship it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

In the Case, on appeal, after narrating the complaint, and that he had authorised the same to be amended, the Sheriff stated :—

I repelled an objection, taken on behalf of the appellant, that the *locus* libelled on in the complaint was not a ‘place’ within the meaning of the statute founded on.

The appellant having pleaded not guilty, proof was led, and the following facts were established in evidence :—

1st. That the appellant and a man named Adam Kilpatrick were the sub-tenants and occupants of the grounds in question, extending to between twenty and twenty-one acres, and fenced all round. During the month of April last the appellant had the sole management of these grounds.

1885.

—  
No. 98.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

1885.

No. 93.  
Henretty.  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

2nd. That on the day libelled, viz., 9th April 1885, a meeting for horse-racing was held within the said grounds, and the races began at about 2 P.M. In the course of the day a great number of people were present, the numbers being variously estimated by the witnesses at from 5,000 to 20,000. The public were admitted on payment of sixpence.

3rd. That at a previous race-meeting, or race-meetings, in the said grounds, while the appellant was occupier, betting had been carried on, and on the day in question there were at least between twenty and thirty bookmakers or professional betting men known to the police within the said grounds. Some of these men stood betting on stools and boxes, while others remained on the ground.

4th. That the following was the mode in which the betting referred to was carried on :—Each member of the public, as he made a bet with a bookmaker, deposited the money representing the amount of his bet, and received therefor a ticket having the bookmaker's name upon it. After the race had been run, the person betting, if he had backed the winning horse, had his deposit returned to him together with the amount of the odds which the bookmaker had laid.

5th. That on the day in question, while the racing was going on, and before the running for the 'Shawfield Stakes,' a number of people succeeded in getting into the grounds without payment by breaking through and climbing over the fences at one or two places, and there was some evidence to the effect that one or two races were delayed a little in consequence of the disturbance and overcrowding thereby caused. But otherwise the proceedings at the meeting went on to their natural termination, all the races on the printed programme, except the race called the 'Consolation Stakes,' having been run, besides one or two 'trotting heats' not on the programme.

6th. That Thomas Gibbons entered into the three bets libelled, in the manner libelled, and gave to each of the three individuals named a ticket on which was marked the money paid on deposit. Each of these tickets bore the name 'T. Gibbons.' Two of these tickets were produced.

7th. That the appellant was on the said grounds during the time libelled. He could not fail to see the betting going on, and though there was no evidence to show that he saw any particular bets made by Gibbons, he was proved to have been within ten yards of the latter at the time he was making bets on the said 'Shawfield Stakes.' It did not appear from the evidence that the appellant and Gibbons had spoken to each other at any time in the course of the day, and there was no evidence to show that the appellant saw Gibbons, when betting, receiving cash, but it was clear that the

appellant must have known that Gibbons was making bets, as he (Gibbons) was standing on the hand-cart, and raised above the crowd, and was inducing persons to bet with him by calling out the odds at the time the appellant was within ten yards of him as above mentioned.

8th. That the appellant had upon all his race cards a prohibition against betting, and that posters were put up at the gateways and in the grounds containing a similar prohibition. There was also some evidence to the effect that early in the forenoon he gave instructions to some of his servants to warn bookmakers against betting on stools or boxes, and that some bookmakers were warned accordingly; but these instructions and warnings were directed mainly, if not altogether, against certain English bookmakers, and otherwise he made no effort to interfere with the betting. Further, it was proved that, shortly after the race for the Shawfield Stakes had been run, the appellant was spoken to on the subject of betting by the police inspectors, and they offered, if he would give them permission, to turn the bookmakers off the grounds, but he declined their offer, stating in effect that they might make a test case of it if they pleased.

9th. That the hand-cart or hand-barrow in question was not the property of the said Thomas Gibbons, or of the appellant, and the evidence was conflicting as to whether Gibbons had paid anything for its use; but he was in occupation of it during the time the racing went on, in the sense that he made and paid his bets upon it. There was, however, evidence that the said cart or hand-barrow was also occasionally used during the races, and while betting was not going on, by other persons—perhaps as many as six or eight at a time—who got up on it in order the better to command a view of the grounds.

10th. That some correspondence between the police and the appellant's agent previous to the day in question was produced and founded on by the appellant, with the view of showing that the appellant had, previous to the meeting, craved aid of the police in the preservation of order and due control of the grounds, but the police did not see their way to interfere with private grounds, further than to send a certain number of police into the grounds to detect cases of betting, and a further number to protect the public roads and adjoining properties. The appellant had a number of commissionaires present, in addition to his own servants, to assist him in maintaining order, but they had no instructions to interfere with the bookmakers.

On the whole evidence, I found it proved that the appellant knowingly and wilfully permitted the grounds in question to be used for the betting libelled. I therefore, on the said 8th June,

1885.

---

No. 93.  
Henretty  
v.  
Hart.

---

High Court,  
Dec. 17.

---

Appeal.

1885.

No. 93.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

convicted him of the offence charged, and adjudged him to pay a modified penalty of £10.

The questions of law were—1st, Whether the complaint as amended was relevant, and in particular whether the grounds in question were ‘a place’ within the meaning of the statutes libelled? 2nd, Whether, on the facts held to have been proved, the Sheriff-Substitute was legally warranted in convicting the appellant? and 3rd, Whether the conviction itself was legal and competent?

BRAND for the appellant.—This is the first case which has occurred in this Court under the Betting Acts. The Act of 1853 (16 and 17 Vic., c. 119, Blackwood’s Statutes for 1874, at p. 330 Appendix), by section 20, declared that it should not extend to Scotland; but that section was repealed by the Act of 1874 (37 Vic., c. 15), which extended the provisions of the Act of 1853 to this country, and provided machinery for making it workable there. The questions raised in the Case are (see above), and these depend for their answer upon the answer to be given to the question—Whether the *locus* libelled is a ‘place’ within the meaning of the Act of 1853, at which betting is prohibited? We contend that it is not. The charge is founded on the second part of the 3rd section of the Act of 1853, viz.—‘And any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them,’ . . . viz., the purposes set forth in section 1, ‘shall, on summary conviction,’ &c. It is said that the appellant was the occupier of this enclosed ground, and that he knowingly and wilfully permitted betting to be carried on by M’Gibbon, who stood upon a handbarrow within the grounds and made bets. In construing the Act, regard must be had to the preamble,<sup>1</sup> from which it is clear, as has been ob-

<sup>1</sup> Statute 16 and 17 Vic., c. 119 (An Act for the Suppression of Betting-Houses).—‘Whereas a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons

served in the cases under the statute which have occurred in England, *Bows v. Fenwick*, 4th May 1874, L.R., ix. Com. Pl., p. 339 ; *Shaw v. Morley*, L.R., iii. Exch. Ca., p. 137, that when the Act was passed the Legislature did not intend to prohibit gaming altogether, but that kind of gaming only which is described in the preamble.

[Reads.] The Act was not intended to prohibit all betting between man and man, especially on a racecourse. If that had been intended, the language of the statute would have been unambiguous. *Shaw v. Morley*, *supra* (Pigott, B., at p. 140). It is only betting of the kind specified, and which is carried on in 'a house, office, room, or other place opened, kept, or used' for the purpose defined in section 1 of the Act, which is prohibited. Accordingly, there have been a number of cases in England in which the question raised was whether the *locus in quo* was a 'place' within the meaning of the Act. The *locus* in the present case is, I shall assume, the enclosed grounds called Shawfield Recreation Grounds, and more particularly a hand-cart in said grounds. [Reads complaint, see p. 705.] The facts of the case are that the grounds in question, which extend to from twenty to twenty-one acres, are used for racing matches and other sporting events, and are occupied by the appellant Henretty and another. On 9th April 1885 certain horse-races were advertised, and before these were run certain persons succeeded in obtaining forcible access to the grounds without making payment of the entry-money. Notwithstanding, the races were run, and the betting-man, M'Gibbon, was on the ground standing upon a hand-cart about ten yards from the appellant, one of the occupiers of the ground, crying out the odds, and making bets in the manner libelled. The cart did not belong to him or

1885.

No. 98.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

---

by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promise to pay money on events of horse-races and the like contingencies. For the suppression thereof be it enacted, &c.

1885.  
 No. 93.  
 Henretty  
 v.  
 Hart.  
 High Court,  
 Dec. 17.  
 Appeal.

to the appellant, and it was never discovered to whom it belonged. Placards were posted throughout the grounds, intimating that all betting was prohibited, and a similar intimation was printed upon each of the cards containing the lists of the races, but no other steps were taken to put down the betting which we admit took place. Our contention is that the betting which took place was not such as fell within the provisions of the Act—that the hand-barrow libelled was not a ‘house, office, room, or other place,’ in terms of the provisions of Act. It cannot be said to be a ‘house, office, or room,’ and if it is contended that it comes within the words ‘or other place,’ our answer is that these words must be construed as including only places *ejusdem generis* with those specified. *Shaw v. Morley, supra*. It must also be a place ‘opened or used’ for the purpose specified in section 1 of the Act of 1853. We do not say that it must necessarily be a roofed place, but it must, we contend, be a fixed and ascertained place used for the purpose of betting, and where betting is carried on with all persons who may resort thither. *Bows v. Fenwick, supra*; *Shaw v. Morley, supra*; *Morley and others v. Greenhalgh and others*, 17th Jan. 1863, xxxii. L.J., Mag. Ca., p. 93; *Clark v. Hague*, 26th Jan. 1860, xxix. L.J., Mag. Ca., p. 105; *The Queen v. Cook*, 30th May 1884, xiii. L.R., Qu., B. Div., p. 377; *Dogget v. Catterins*, 6th Feb. 1865, xxxiv. L.J., Com. Pl., p. 159; *Snow v. Hill*, 4th March 1885, xiv. L.R., Qu., B. D., p. 588. Stretfield on ‘The Law relating to Betting,’ &c. In judging of the relevancy of the complaint, the material circumstance to consider is, we say, the answer to the question—For what were these grounds being kept open? There are no facts libelled to show that they were being kept open for the purpose of betting. It is not sufficient to allege that betting was knowingly and wilfully permitted. These words must be read in conjunction with the specification of the *locus* in the complaint, and all that is said is that



the grounds are a place within the meaning of the Act; but it is not said that they were open for the purpose of betting. It is no doubt also said that the appellant is the occupier of the grounds, and that he did on the date libelled knowingly and wilfully permit them to be used by M'Gibbon for betting, 'and more particularly by then and there knowingly and willfully permitting M'Gibbon to stand on a hand-cart and bet,' &c., from which it would appear that it is the hand-cart which is more particularly specified as the *locus*. But it is not said that the cart was the property of the appellant or of M'Gibbon, or that it was brought there by either of them.

LORD YOUNG. — You say that the cart was just M'Gibbon's *locus standi*.

BRAND, for the appellant.—It was. Further, it is not even said that M'Gibbon was known to or invited by the appellant to go there. In point of fact, the appellant did not know M'Gibbon, and neither he nor M'Gibbon knew to whom the cart belonged. The *locus* libelled is not, we contend, a *locus* at which, in terms of the statute, the offence libelled can be committed. There is, therefore, no offence relevantly libelled. It is perfectly legal knowingly and wilfully to permit betting within an enclosure like the present, which is not a place within the meaning of the Act. And as, from the facts stated in the Case, it does not appear that the appellant knowingly and wilfully permitted betting to be carried on from a fixed or ascertained place of the nature of a house, room, or office, opened or used for the purpose of betting in the sense of the Act. The conviction and sentence was therefore not warranted, and the appeal ought to be sustained.

GLOAG and WALLACE, for the respondent.—The Shawfield Grounds are a place in the sense of the Act. The cases referred to by the appellant to show that this hand-barrow is a 'place' or an 'office,' are not in point, because it has not been so libelled. They are of authority, however, as showing the view that has been

1885.

---

 No. 93.  
 Henretty  
 v.  
 Hart.

---

 High Court,  
 Dec. 17.

---

 Appeal.



1885.  
 No. 98.  
 Henretty  
 v.  
 Hart.  
 High Court,  
 Dec. 17.  
 Appeal.

taken by the Courts in England of these expressions in the Act. The cases make it clear that a stone and lime building is not necessary. Any structure, whether movable or fixed to the ground, is sufficient so long as it so clearly marked out the place to people wishing to bet where to go. A large umbrella fastened to the ground has been held to be struck at. *Bows v. Fenwick, supra*; and a box not attached to the ground, *Galloway v. Maries*, 30th Nov. 1881, viii. L.R., Q., B. Div., 275. It has also been decided that a roof is not necessary, and the objection to the size of the grounds is also of no avail to the appellant. *Eastwood v. Miller*, 3rd June 1874, ix. L.R., Q., B., 440; *Haigh v. Town Council of Sheffield*, 11th Nov. 1874, x. L.R., Q., B., 102. Secondly, these latter cases settle the question, whether the appellant had knowingly and wilfully permitted the grounds to be used for betting. These were prosecutions against the owners of the grounds who knew of the betting, and the purpose for which the grounds were kept was racing, as in the present case. In the case of *The Queen v. Cook, supra*, the prosecution was against the manager, not the owner, and the case was properly dismissed against him, as betting was not part of the business he had to manage. Reference may be made to Justice Hawkins' opinion, p. 385 of the report.

LORD YOUNG.—This is a Case stated to us by one of the Sheriff-Substitutes of Lanarkshire, upon a conviction of the appellant obtained upon a complaint for an offence under the Act, for the suppression of betting-houses, passed in 1853. That Act did not at first extend to Scotland, but it was extended by The Betting Act, 1874. The facts upon which the Sheriff Court proceeded are fully and accurately stated by the Sheriff, and they appear to be in substance these:—That the appellant being the lessee along with another of a piece of enclosed ground extending to about twenty acres, called Shawfield Recreation Grounds, which was a race-course, contravened the Act of 1853 in a manner pro-

hibited by section 3 of that statute. The fact was, that the appellant had horse-races on this ground on the date libelled, and the public were admitted on payment of sixpence ; and in the course of the day a person named M'Gibbon made bets with sundry people who were there, he making himself conspicuous by standing upon a hand-barrow, and inviting people to bet with him ; and the Sheriff was of opinion, that although he was not proved to have been an acquaintance of, or to have been known by the appellant, yet, that he, the appellant, could not fail to have seen the betting that was going on, by reason of M'Gibbon's conspicuous position, and from hearing him call out the bets in proximity to the appellant, and that he did not interfere with him, or at least did not effectually interfere with him. The Sheriff also found it proved, that on previous occasions people had resorted to these grounds and kept books, and taken bets, and were not turned out, although there was notice given on the printed cards of the races, and by means of posters, that betting within the grounds was prohibited.

Now, the question is, whether upon these facts an offence was committed within the meaning of The Betting Act of 1853 ? There are two clauses of that Act particularly referred to, and cited at length in the complaint—[reads]. That is substantially an enactment against the owner or occupier, or any person employed by the owner or occupier of a ' house, office, room, or other place,' opening, keeping, or using the same for the purpose of there betting with persons resorting thereto. The second clause is section 3 [reads, see complaint, p. 704], and that is an enactment against these persons knowingly and wilfully permitting any other person to open, keep, or use such premises for these purposes. And the particular charge that was here made is [see p. 705]. That the appellant being the occupier of the enclosed grounds called or known as Shawfield Recreation Grounds, &c., being a place within the meaning of the

1885.

---

No. 93.  
Henretty  
v.  
Hart.

---

High Court,  
Dec. 17.

---

Appeal.

1885.  
 No. 93.  
 Henretty  
 v.  
 Hart.  
 High Court,  
 Dec. 17.  
 Appeal.

said first-mentioned Act, did on or about 9th April 1885, knowingly and wilfully permit said grounds to be used by Thomas M'Gibbon, otherwise Gibbons, &c., for the purpose of betting with persons resorting thereto, and more particularly by then and there knowingly and wilfully permitting M'Gibbon to stand on a hand-cart and bet with the following persons; and there then follows the specification of three specific bets taken. And the Sheriff says that the questions of law for the consideration of this Court are—[read, see p. 708].

Now the question whether this racecourse is a 'place' within the meaning of the statutes libelled, is an important and interesting question. The first statute is entitled 'An Act for the Suppression of Betting-Houses,' and the language of it describes the places to which its enactments apply as a 'house, office, room, or other place.' Does that include this racecourse? One would certainly have expected that if the object of the Legislature was to prevent betting upon racecourses, some other language would have been used to include them. I have difficulty in seeing how the language used can be held to have been intended to include a racecourse. We must suppose that the members of the Legislature in 1853 knew enough of English and Scottish life to be aware that betting went on upon racecourses, probably more than at any other place, and if they had intended to include racecourses they would have chosen different words from 'house, office, room, or other place.' It is apparent that the words 'or other place,' according to the usual rule of construction, refer to places similar to those mentioned in the preceding words. The title of the Act also gives us some assistance. It is entitled 'An Act for the Suppression of Betting-Houses,' and its language is consistent with that and nothing else. Indeed, clause 2 says that 'every house, office, room, or other place'—the same words are in clauses 1 and 3—'opened, kept, or used for the purposes aforesaid, shall be taken and deemed to be a common gaming house,' &c. I cannot believe that the

Legislature had racecourses in view in using these words. But I don't think that this question can well be settled without reference to the words 'opened, kept, or used for the purpose of.' When a house, office, room, or any place of that kind is opened for the purpose of betting, it is kept for that purpose. But that is a different thing from wagers taken by persons who are there for another and perfectly different purpose. There are not ten men in every thousand who resort to racecourses who are not aware that betting goes on among those who are there; and although betting takes place upon a racecourse, it cannot be said that the racecourse is kept open as a betting-house, or that it is a common gaming-house, and that the owners or occupiers are thereby made liable to prosecution. There is nothing in the facts stated to us in this case to show that this racecourse was opened and used for the purpose of betting. It was a piece of enclosed ground, within which races were run, and the public were admitted to see them on payment of sixpence each. And although betting took place among those who were there, I must confess that I don't know how the appellant, as owner or occupier, could have stopped it. It may be very foolish to bet, but it is perfectly legal on a racecourse. The appellant had, with great propriety, announced that betting was not allowed, and he might perhaps have said to anyone persisting in doing so, I shall turn you out, as having violated the conditions of the contract upon which he had been admitted within the grounds, but I know of no law which compels him to make that announcement. If violence had been used by any one to turn another off of a racecourse who was betting, it would have been very dangerous. And if a policeman had laid hands on any such, he would have been committing an assault. Keeping a house, office, room, or similar place open as a gaming-house is a very different thing. That is a place opened for the purpose of persons resorting thereto betting with the proprietor or other custodier of the place, and has no resemblance

1885.

---

No. 93.  
Henretty  
v.  
Hart.

---

High Court  
Dec. 17.

---

Appeal.

---

1885.

No. 93.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

to the case of people going to a racecourse for a different purpose, and while there betting with one another. That is the judgment that was given in the last case of this kind which occurred in England, the case of *The Queen v. Cook*. Such cases, although not necessarily binding authorities upon us in this Court, are useful illustrations of examples under the Act. The rubric in that case is—‘The appellant was manager of bicycle grounds. Bicycle races at which 20,000 spectators were present, took place there. Placards with the words, “No betting allowed,” were posted in the grounds, and twelve police constables were employed there by the manager; but some betting took place about twenty yards from the winning-post where he stood, acting as judge of the races. He was aware that betting would and did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to a certain extent with the aid of the constables:—Held that as the business of the ground was not that of illegal betting within 16 and 17 Vic., cap. 119, sec. 1, he was not liable to conviction under section 3 as a “person having the care or management of, or in any manner assisting in conducting the business of any . . . place opened, kept, or used for the purpose aforesaid.”’ And Mr Justice Hawkins says—‘It would be idle affectation to suppose for a moment that the owner of the ground would be ignorant of the fact that very many persons who assemble to witness the sports there would bet amongst themselves. It is almost a matter of course on such occasions; but the law does not forbid ordinary betting between man and man who meet together, whether accidentally or by arrangement. The law will not assist the maker of a debt to recover the sum won, and leaves each of those who bet to rely for payment on the honour of the other. But the law does forbid the keeping or using any house or place for either of the purposes mentioned in section 1, i.e., such business as is described in the preamble of the Act. The management of such a

business is, in my judgment, intended to be provided against and punished in those particular words of section 3, under which it is sought to make the appellant responsible.' And Mr Hawkins proceeds to say that the manager of a place where a lawful business is carried on, but which is used for the purposes of betting, is not responsible under the Act unless he takes part or share in the business of the betting-house. He adds, 'I do not think the Act was intended to apply to any person having the care or management of a lawful business who took no part or share in the illegality there.' Betting was not the business for which the ground here in question was opened, kept, or used. The business was horse-races, and the obtaining of sixpence from persons who came there to see them, and it was not suggested that the appellant was himself making use of it to make bets with those who resorted to it. Upon these considerations, and believing the opinions contained in the case of *The Queen v. Cook* to contain sound views of the law on this subject, I am of opinion that this twenty-acre piece of ground was not a place within the meaning of the statutes libelled. I cannot hold that the Legislature meant to include such a place within the expressions house, office, room, or other place. It is not within the purview of the Act of 1853. And I am also of opinion that it was also not permitted to be used by others for the purpose of betting. That, from the facts stated, was not the business, or even a branch of the business, for the carrying on of which it was kept, opened, or used. I am therefore for sustaining the appeal, and recalling the conviction which was pronounced.

LORD CRAIGHILL.—The questions which are submitted to the Court for their consideration and decision in this special case are (1), whether the grounds occupied by the appellant are 'a place' within the meaning of the statutes libelled? and (2), whether on the facts held to have been proved, the Sheriff-Substitute was legally warranted in convicting the appellant? Upon both my opinion is

1885.

---

No. 93.  
Henretty  
v.  
Hart.

---

High Court,  
Dec. 17.

---

Appeal

---



1885. that the answer should be in the affirmative, and the  
No. 93. appeal be dismissed. The statutes referred to are The  
Henretty Betting Act of 1853 (16 and 17 Vic., cap. 119) and The  
v. Betting Act of 1874 (37 Vic., cap. 15). With the  
Hart. latter, however, we have no concern on the present oc-  
High Court, casion, except that by its provisions the Act of 1853 is,  
Dec. 17. subject to specified modifications, extended to Scotland.  
Appeal. The portion of the Act of 1853 which the appellant was  
said to have contravened is that part, being the second  
clause of section 3, by which it is enacted that ‘any per-  
son who, being the owner or occupier of any house, room,  
office, or other *place*,’ ‘shall knowingly and wilfully per-  
mit the same to be’ ‘used *by any other person for the pur-  
poses aforesaid*’—that is to say, the purposes specified in  
section 1—‘or either of them,’ ‘shall, on summary convic-  
tion thereof,’ be liable to forfeit and pay such penalty,  
not exceeding £100, as shall be adjudged by the magis-  
trate before whom he is tried. The appellant contends  
that he has been erroneously convicted, because the place  
where the betting, which in the view of the magistrate  
was proved to have occurred, was not a ‘place’ within  
the meaning of this enactment. The *locus*, as the com-  
plaint was amended by leave of the Sheriff, was described  
as ‘enclosed grounds called or known as Shawfield  
Grounds, situated in the parish of Govan and county of  
Lanark,’ and what we have now to decide is, whether the  
Sheriff was wrong in holding that this *locus* was a ‘place  
within the meaning of the statute libelled.’ This, as  
already mentioned, is the first of the two questions pre-  
sented in this Special Case. ‘I see no reason whatever  
from the framing of the Act to hold that there cannot be  
a “place” within the meaning of the Act, unless it is a  
structure of some kind—a building or a tent. An en-  
closed area, though uncovered, might as well be a place  
within the meaning of the Act as a place either covered  
with canvas as a tent, or a light structure, as a building.  
It is an enclosed place, occupied exclusively by the  
appellant, and is therefore within the language and the



intent of the Act. The fact that it is a large enclosure cannot affect the question. Whether it is a quarter or half an acre, or three acres, cannot affect the question if it is a place occupied and enclosed within the meaning of the Act to which persons were admitted by the sufferance of the occupier. These are, in every important particular, the words used by Mr Justice Lush when he delivered judgment in the case of *Eastwood v. Miller*, June 3, 1874, ix. L.R., Q.B. 440 ; and words to the same effect were used upon the same occasion by Mr Justice Archibald. Words to the same effect were used in the case of *Haigh v. The Town Council of Sheffield*, November 11, 1874, x. L.R., 10 Q.B. 102, by Mr Justice Blackburn and Mr Justice Mellor ; and they express my opinion on the question now before us, which was the very question before these learned Judges. I use these words as the vehicle of my opinion, not because they are of authority in this country, though they will always be received with respect, but because better could not be employed, and I think it unnecessary to add anything by way of further explanation of my grounds of judgment except this. The case of *The Queen v. Cook*, May 30, 1884, xiii. L.R., Q.B. Div. 377, was cited on the part of the appellant as a decision by which the other cases were overruled ; but such a view is a misapprehension. In the first place, the meaning of the word 'place' was not raised for consideration in the case of *Cook*. In the second place, there is nothing said by any of the Judges in *Cook's* case which even inferentially is adverse to the earlier decisions ; and thirdly, the provisions of the statute which was constructed in *The Queen v. Cook* was different from that which was before the Court in the cases of *Eastwood* and *Haigh*. The judgment and opinions in the former are noways at variance with those in the others.

As to the second question, I think that on the facts proved the Sheriff-Substitute was legally warranted in convicting the appellant. These facts satisfied the

1885.

---

No. 93.  
Henretty  
v.  
Hart.

---

High Court,  
Dec. 17.

---

Appeal.

1885.

No. 93.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

Sheriff-Substitute that the appellant 'must have known' of the betting alleged in the complaint to have been carried on within the appellant's grounds, which is in truth the same as if he had said that the appellant knew of this betting. Knowing of the betting he did not interfere to prevent it, and therefore the inference is irresistible that he knowingly and wilfully allowed his grounds to be used for a purpose forbidden by the Act.

The LORD JUSTICE-CLERK. — This is an important question, and the case is all the more so as your lordships have differed in your opinions. My opinion agrees with that of Lord Young; and I would not have had the smallest doubt upon the points raised but for the English cases which were cited to us. There are two questions mainly raised, viz.—1st, Whether this racecourse was a place within the meaning of the statutes at which betting was prohibited; and, 2d, Whether it was opened, kept, or used for that purpose. Now, it will be observed that the statute of 1853, in its preamble, does not profess to put down or punish all betting. I think that in the light of the words 'house, office, room, or other place,' the statute aimed at places of the nature of buildings. It is not the province of a court of law to put a forced construction upon the words of the statute, intended for the suppression of crime, beyond what is their ordinary signification. I think we must read the words house, office, and room, in their usual sense, the same as we would do in any other case; and that it would be putting an inaccurate gloss upon these words to extend them to a place to which, in ordinary language, they could not by any possibility be referred. And in regard to the words 'or other place' which follow, we must, I think, according to the ordinary rule of construction, introduce the word 'similar,' and make the clause read 'or other similar place.' I cannot extend their meaning, especially in a penal statute, so as to include within them grounds of the nature of those in question. I am of opinion that

this racecourse or recreation ground was not, in any sense, a place of the character intended to be struck at; and, secondly, that it was not opened, kept, or used for betting, in the sense of the statute, but was opened, kept, and used for racing horses. If the Legislature had intended to extend the provisions of the Act to such places as racecourses, it would have said so. Indeed, I do not understand it to be disputed that horse racing was its primary purpose, though it is contended that as the owner must have known that betting went on there, he must be held responsible under the statute. That betting did take place may be quite true—the Sheriff has found that there was some betting, and we must take it so: but so it does on every racecourse; yet, as Lord Young pointed out, that will no more make this racecourse a place kept for the purpose of betting than it would Epsom Downs or Ascot Heath. Now, if the Legislature had intended to extend the operation of the statute to those well-known places, it would, I do not doubt, have used language that would have left its intention beyond question. I therefore think that it is a mere gloss, and an inaccurate gloss, to attempt to extend the Act to this small piece of ground when it cannot be said to apply to those larger and better known places of public resort. I am, therefore, for setting aside this conviction.

The following was the Interlocutor:—

‘*Edinburgh, 17th December 1885.*—Having considered this Case and heard Counsel for the parties, Answer the first and second questions in the Case in the negative: Sustain the appeal: Reverse the determination of the Sheriff, and decern: Find the appellant entitled to expenses, which modify to ten guineas; for which, and one guinea as the dues of extract, decern against the respondent.’

Agent for the Appellant—WILLIAM OFFICER, S.S.C.  
CROWN AGENT.

1885.

No. 93.  
Henretty  
v.  
Hart.

High Court,  
Dec. 17.

Appeal.

## WEST CIRCUIT.

## GLASGOW.

Present,

LORDS ADAM AND M'LAREN.

HER MAJESTY'S ADVOCATE—*Wallace, A.-D.*

AGAINST

CHARLES KELLY—*M'Lure.*

STATUTE 48 AND 49 VIC., c. 69, SEC. 5, SUBSEC. 1 (Criminal Law Amendment Act, 1885)—UNLAWFUL CARNAL KNOWLEDGE OF A GIRL UNDER SIXTEEN—*MODUS*—RELEVANCY.—An indictment which charged, *inter alia*, the statutory offence set forth in subsection 1 of section 5 of The Criminal Law Amendment Act, of attempting to have unlawful carnal knowledge of a girl above thirteen and under sixteen, was objected to on the ground that it contained no specification in the minor of the manner in which the alleged attempt had been made, except by the use of the words in the statute, 'did attempt to have unlawful carnal knowledge of' the girl.

Objection sustained, and the libel found to be not relevant.

1885.

CHARLES KELLY was accused—

No. 94.  
Charles  
Kelly.

Glasgow,  
Dec. 24.

Stat. 48 & 49  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.

THAT ALBEIT, by an Act passed in the forty-eighth and forty-ninth year of the reign of Her Majesty Queen Victoria, chapter sixty-nine, entitled 'An Act to make further provision for the protection of women and girls, the suppression of brothels, and other purposes,' it is by the 5th section thereof enacted, that 'Any person who (1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl, being of or above the age of thirteen years, and under the age of sixteen years: or (2) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile, woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour; provided that it shall be a sufficient defence to any charge under subsection 1 of this section, if it shall be made to appear, to the Court or Jury before whom the charge shall be brought, that the person so charged had reasonable cause

to believe that the girl was of or above the age of sixteen years ;' and by the 15th section of the said Act it is, *inter alia*, enacted that, ' In the application of this Act to Scotland, the expression " misde-meanour," shall mean a crime and offence : ' AND ALBERT, by the laws of this and of every other well-governed realm, assault, especially when committed by a husband upon a wife, to the effusion of blood and injury of the person, and by a person who has been previously convicted of assault, is a crime of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said Charles Kelly are guilty of the said crime and offence set forth in the 1st subsection of section 5th, as applied to Scotland by section 15th of the statute above libelled, and of the said crime of assault, aggravated as aforesaid, or of one or other of them, actor, or art and part : IN SO FAR AS (1) on the 5th day of October 1885, or on one or other of the days of that month, or of September immediately preceding, in or near the house or premises in or near Vennel, Greenock, then occupied by you, you the said Charles Kelly did attempt to have unlawful carnal knowledge of Margaret Sharp, then a girl between thirteen and fourteen years of age or thereby, or otherwise of or above the age of thirteen years and under the age of sixteen years, then domestic servant to you, and daughter of, and then and now or lately residing with, Helen Gordon or Sharp, widow, in or near Dalrymple Street, Greenock : LIKEAS (2), time and place above libelled, you the said Charles Kelly did, wickedly and feloniously, attack and assault Bridget Donnelly or Kelly, your wife, then residing with you, and now or lately residing in the said house or premises, and did with your fists strike her one or more violent blows on or about the head or other part of her person, and bite her hand, and seize her by the hair of the head, and pull her down to the floor, and drag her about, and kick her several or one or more times on or about the back and shoulders and haunches, and other parts of her person, and throw a glass bottle and several earthenware or other vessels at or towards her, one or more of which struck her on or about the face and head or other part of her person, and did otherwise maltreat and abuse her, by all which, or part thereof, she was wounded and bruised to the effusion of her blood and injury of her person : And you the said Charles Kelly have been previously convicted of assault : And you the said Charles Kelly having been apprehended, &c.

1885.

No. 94.  
Charles  
Kelly.Glasgow,  
Dec. 24.Stat. 48 & 49  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.

M'LURE, for the panel, objected to the relevancy.— There is no *modus* set forth in the indictment, and the accused has therefore had no notice of the facts upon which the Crown alleges he committed the offence.

1885.

No. 94.  
Charles  
Kelly.Glasgow,  
Dec. 24.Stat. 48 & 49  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.

Such a statement is essential to the constitution of a good libel, and especially in a libel charging an offence under this Act. The statutory offence of attempting to have unlawful carnal knowledge may not in reality be constituted by the facts in the knowledge of the prosecutor, and his failure to set forth what he is relying upon is practically 'vesting himself with the entire cognizance of the relevancy of his own libel.' Hume, vol. ii., p. 190.

The ADVOCATE-DEPUTE having been heard in reply,—

LORD ADAM.—This is a charge under subsection (1) of section 5 of the Criminal Law Amendment Act. That subsection provides that 'any person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years, and under the age of sixteen years,' shall be guilty of a crime and offence, and be subject to be imprisoned for any term not exceeding two years. The objection taken arises as to the *modus* of the minor proposition of the indictment, and it is that while the minor sets forth a place and date as the place of the alleged offence, and also the fact that at that place and date the prisoner 'did attempt to have unlawful carnal knowledge of Margaret Sharp, then a girl between thirteen and fourteen years of age or thereby, or otherwise of or above the age of thirteen years, and under the age of sixteen years,' there is no specification at all of the *modus* of this alleged offence. The answer made for the Crown is (1) that this is a statutory charge, and that it is sufficient to have used the statutory words; and (2) that the prisoner has in this indictment all necessary and reasonable information, and therefore all that he is entitled to require.

Neither answer appears to me to be well founded. Such an attempt may be made in many ways, and yet there is no information here as to what it is proposed to prove as constituting the offence. It is not even said that the prisoner put a finger on the girl. I do not know,

and the prisoner is not informed, whether physical violence is to be proved against him or seduction. It may be, but it is not said, that the Crown proposes to prove that money was offered to her as an inducement. No information is given as to the nature or gravity of the offence said to have been committed. This transgresses the cardinal principle that the prisoner is entitled to information as to what is to be proved.

I think on these grounds that the objection ought to be sustained.

LORD M'LAREN.—I am of the same opinion. In the Criminal Courts notice to the prisoner is of the essence of relevancy. In Civil Courts there is a discretion with the Judge whether a case should be thrown out as wanting in relevancy or be amended. But in this Court we have not the power of making amendments on the libel, and therefore, in all cases, reasonable notice of the denomination of the crime with which the panel is charged, and also of the particular time, place, and manner in which he is said to have committed the crime, must be given in the indictment as framed, and is of the essence of the relevancy of the charge. If this were an indictment charging the prisoner with having had unlawful carnal connexion with a girl under the age of sixteen, I see some force in the answer that while in cases of rape it is customary to give a description of the act of forcible intercourse, yet in a charge under the statute, such a narrative would really add nothing to the meaning of the statement that the Act of Parliament was contravened, and therefore that this being a new crime, it was sufficiently libelled by following the statutory words. I do not, therefore, say that in a charge of having unlawful carnal connexion with a girl under the age of sixteen, anything more need be stated than the place and date of the offence. Indeed, it is difficult to see that more than this would be useful, because the crime consists in the physical act of connexion, which does not need to be described. But an attempt to have

1885.

---

No. 94.  
Charles  
Kelly.  
Glasgow,  
Dec. 24.

---

Stat. 48 & 49  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.



1885.

No. 94.  
Charles  
Kelly.

Glasgow,  
Dec. 24.

Stat. 48 & 49  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.

unlawful carnal connexion may be made in many ways, and it is not to be assumed that everything, which in a moral sense may be called an attempt to seduce, falls within the scope of the enacting words. If there is a physical attempt, although not by violence such as would constitute an assault with intent, the case is tolerably clear; but the case is not so clear when the object is sought to be accomplished, for example, by an offer of money, or verbal seduction by word or letter, or it might be by the offer or payment of money made through a third person. It is therefore very necessary that the person charged with what is termed an attempt to have unlawful carnal connexion should have fair notice of the *species facti* which are intended to be proved against him, that he may be prepared to defend himself. As such notice has not been given in this libel, I concur in holding the objection taken to its relevancy to be well founded.

The Court accordingly sustained the objection, and held the libel to be irrelevant. The diet, on the motion of the Advocate-Depute, was thereupon deserted *pro loco et tempore*.

The panel was thereafter recommitted on a new warrant, and was subsequently tried on a new libel before the High Court—Lord Young presiding—upon the 11th January 1886. The libel set forth the *modus* of the offence as follows :—

IN SO FAR AS on the 5th day of October 1885, &c., in or near the house or premises in or near Vennel, Greenock, then occupied by you, you the said Charles Kelly having induced Margaret Sharp, then a girl between thirteen and fourteen years of age or thereby, or otherwise of or above the age of thirteen years and under the age of sixteen years, and not being your wife, but being then domestic servant to you, and daughter of, and then or now or lately residing with, Helen Gordon or Sharp, widow, in or near Dalrymple Street, Greenock, to take off her clothes and get into a bed in your said house, you did then and there take off your trousers and lie down in the bed beside her and place your hand upon her private parts and draw her towards you and lie above her and

attempt to introduce your private member into her private parts,  
and you did thus attempt to have unlawful carnal knowledge of the  
said Margaret Sharp.

1885.  
—  
No. 94.  
Charles  
Kelly.

The panel having pleaded not guilty, evidence was led,  
and the following was the verdict of the Jury :—

Glasgow,  
Dec. 24.

‘ The Jury find the panel guilty of the statutory charge  
as libelled.’

Stat. 48 & 48  
Vic., c. 69,  
sec. 5.  
Criml. Law  
Amend. Act.

The Court sentenced the panel to be imprisoned and  
kept to hard labour for one year, to run from the date  
of his first commitment.

Agent for the Panel.—     MURRAY, Writer, Greenock.



## INDEX OF MATTERS.

---

### ACCOUNT, LIABILITY TO.

See THEFT, p. 552.

### ADJOURNMENT OF DIET.

A person was arrested at seven o'clock at night, kept in jail all night, and placed at the bar of the Police Court at ten o'clock the following morning, when he was charged with the crime of theft. No warrant had been made out for his apprehension or detention, or for the citation of witnesses. About an hour previous to the trial he was asked if he had any witnesses to call, and he mentioned five, who were cited. At ten o'clock he was asked if he 'was ready to go on,' and answered yes. He pleaded not guilty, and also an *alibi*. Two of his witnesses, owing to the short notice, did not appear, and he was convicted.

Held that it was the duty of the magistrate on a complaint under the Summary Jurisdiction Acts, charging the crime of theft, to inform the accused of his right to an adjournment for forty-eight hours, especially if no complaint had been previously served on him; and the sentence suspended on the ground that the proceedings were too rapid for the protection of the interest of the accused, and to render the conviction safe.

*Pyper v. Walker*, High Court, 10th July 1885.

### DULTERATION OF MILK.

The 22nd section of the Sale of Food and Drugs Act, 1875, enacts, that the Sheriff before whom any complaint under the Act is made, upon the request of either party, at his discretion, may cause any article of food or drug to be sent to the Commissioners of Inland Revenue, 'who shall thereupon direct the chemical officers of their department at Somerset House to make the analysis, and to give a certificate to such Sheriff of the result of the analysis.'

Held (*diss.* Lord Craighill) that the reference under this enactment to the Somerset House officers is for the purpose of obtaining the result of their analysis merely, and that therefore their opinion as to what is the minimum percentage of fat to be found in new milk cannot be received as evidence.—

*Dargie v. Dunbar*, High Court, 18th March 1884, p. 409.

**AGENT AND CLIENT.**

See **BREACH OF TRUST AND EMBEZZLEMENT**, p. 492.

**AGGRAVATION.**

Objection to an indictment, which charged assault aggravated *inter alia* by being committed by discharging loaded firearms, that although this aggravation was set forth in the affirmation at the commencement of the minor proposition the subsumption did not contain an averment that firearms had been discharged, sustained, and the aggravation allowed to be struck out on the motion of the prosecutor.—*Thomas Devaney*, Glasgow, June 20, 1882, p. 31.

See **SENTENCE FOLLOWING TEN PREVIOUS CONVICTIONS**, p. 448.

„ **WILFUL FIRE-RAISING**, p. 451.

**AIDING AND ABETTING MOB.**

See **MOBBING AND RIOTING**, p. 124.

**ALMS, COLLECTING.**

See **BEGGING, FRAUDULENT**, p. 193.

**ALTERNATIVE CHARGE AND GENERAL CONVICTION.**

A summary charge of assault (in the Glasgow Police Court) in so far as the accused did at a certain time and place ‘wickedly and feloniously assault, strike on the face, or otherwise abuse’ two persons ‘to their hurt and injury respectively,’ was followed by a general conviction ‘of the crime libelled.’ The accused brought a suspension in the High Court of Justiciary. The Court, repelling an objection to their jurisdiction that the provisions of the Glasgow Police Act, 1866, excluded review except by the Circuit Court, suspended the conviction (*disa.* Lord Justice-Clerk).—*Bell v. M<sup>c</sup>Phee*, High Court, 18th July 1883, p. 312.

See **FRAUDULENT DEBTOR**, p. 48.

„ **HOTEL, KEEPING OPEN**, p. 215.

„ **BREACH OF THE PEACE**, p. 278.

„ **SALMON FISHING**, p. 305.

„ **SHIP**, p. 367.

„ **BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY**, p. 443.

„ **NUISANCE, SMOKE**, p. 509.

„ **FRAUDULENT BANKRUPT**, p. 665.

**AMENDMENT OF DATE OF OFFENCE.**

See **DEFORCEMENT**, p. 582.

**AMENDMENT OF CASE.**

See **REMIT TO SHERIFF**, p. 514.

**ANALYST—GOVERNMENT.**

See **ADULTERATION OF MILK**, p. 409.

## APPEAL.

A private Act of Parliament authorising the construction of an underground railway, directed that a penalty not exceeding £20 per day, to be imposed on the railway company for the interference with the carriageway of the streets beyond a fixed period, should 'be recoverable with costs in the Court of the Sheriff of the county of Lanark on summary application by all or any of the proprietors or tenants in that part of the street' which was opposite the portion which had not been restored within the fixed period.

In an appeal on a Case stated under the Summary Prosecutions Appeals Act, 1875, against a judgment of the Sheriff under the Summary Jurisdiction Acts, 1864 and 1881, convicting the Company of a contravention of their Act, the appellants objected to the competency of recovering the penalties provided by way of complaint under the Summary Jurisdiction Acts, in respect that they were not penalties in the sense of these Acts, which were not capable of being applied to incorporations which could not suffer imprisonment—the proper remedy being a summary application in the Ordinary Sheriff Court. The Court dismissed the appeal. Opinions as to whether the Court of Justiciary has power in a Case stated for its opinion under sec. 3 of the Summary Prosecutions Appeals Act of 1875, to modify the penalty imposed by the inferior Judge.—*Glasgow City and District Railway v. Hutchison's Trustees*, High Court, 20th March 1884, p. 420.

See STATUTE 42ND AND 43RD VIC., c. CXXXII. (Edinburgh Municipal and Police Act, 1879), p. 160.

„ WEIGHTS AND MEASURES, p. 243.

„ STATUTE 38TH AND 39TH VIC., c. 62, SEC. 3 (Summary Prosecutions Appeals Act, 1875), pp. 274 and 329.

———— CASE ON, AMENDING.

See REMIT TO SHERIFF, p. 514.

———— COMPETENCY OF.

See WEIGHTS AND MEASURES, p. 243.

„ STATUTE 38TH AND 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), pp. 274, 329.

„ EXPLOSIVES KEEPING, p. 539.

———— UNDER SMALL DEBT ACT.

See REMIT TO SHERIFF, p. 624.

## RT AND PART.

See FRAUDULENT BANKRUPT, p. 664.

## ASSAULT.

See ALTERNATIVE CHARGE AND GENERAL CONVICTION, p. 312.

„ MOBING AND RIOTING, p. 317.

„ SENTENCE, SUSPENSION OF PART OF, p. 454.

**ASSAULT, FOLLOWED BY DEATH.**

See THOLING ASSIZE, p. 206.

**———— WITH LOADED FIREARMS.**

See AGGRAVATION, p. 31.

**ATTENDANCE ORDER.**

See EDUCATION ACTS, p. 614.

**ATTEMPT TO EXTORT MONEY.**

See VIOLATING SEPULCHRE, p. 65.

**ATTEMPTING TO HAVE UNLAWFUL CARNAL KNOWLEDGE, &c.**

See STATUTE 48TH AND 49TH VIC., c. 69 (Criminal Law Amendment Act, 1885), p. 696.

„ UNLAWFUL CARNAL KNOWLEDGE, ATTEMPTING TO HAVE, p. 722.

**BAIL.**

In a case which was certified from a Circuit Court to the High Court upon an objection to relevancy, and the panel, who was out on bail, failed to appear at the diet fixed for his appearance before the High Court.—Held that the Court could competently pronounce sentence of fugitation, and declare the bail-bond forfeited, and such sentence pronounced accordingly.—*John Hannah*, High Court, 2nd Nov. 1883, p. 346.

**BAIL-BOND—FORFEITURE OF.**

See BAIL, p. 346.

**BANKRUPT—FRAUDULENT.**

See FRAUDULENT DEBTOR, p. 48.

„ FRAUDULENT BANKRUPT, pp. 473, 665.

**BANKRUPT—FRAUDULENT, CONCEALMENT OF PROPERTY BY.**

An indictment charged the putting away, carrying off, or concealing of his funds by a bankrupt, for the purpose of defrauding his creditors, also the statutory crimes and offences in section 13, sub-sections 1, 2, and 3 of 'The Debtors (Scotland) Act, 1880,' and set forth in the minor that the panel did, alternatively, put away, carry off, or conceal certain funds, &c., on an occasion between 25th October 1882 and 1st March 1883, which was within four months next prior to the presentation of the petition for his sequestration. Further, in the charge under sub-section 1 of section 13 charging the failure fully and truly to disclose the state of his affairs to the best of his knowledge and belief, the libel contained no specific averment regarding the panel's knowledge and belief.

Held, upon objections, that the libel was not irrelevant by reason of the alternatives objected to ; also that the allegations in the minor sufficiently negatived the possibility of the acts libelled having been done without knowledge and belief, and that



**BANKRUPT—FRAUDULENT—*continued*.**

there was not too great latitude taken in libelling the time, and the objections repelled accordingly.

Sentence, ten months' imprisonment.—*Wm. Thiele* or *Cornelius*, High Court, 25th March 1884, p. 443.

See FRAUDULENT DEBTOR, p. 48.

**BANK DIRECTOR—FRAUDULENT.**

A bank director, who pleaded guilty to having used and uttered, as true, fabricated and falsified reports and balance sheets or statement of affairs, of the bank of which he was director, applicable to three consecutive years, knowing the same to be fabricated and false, for the purpose of concealing and misrepresenting the true state of the company's affairs, with intent to defraud, and whereby members of the company and of the public were deceived, imposed upon, and defrauded, sentenced to eight months' imprisonment.—*James Nicol Fleming*, High Court, July 3, 1882, p. 37.

**BANK MANAGER—EMBEZZLEMENT BY.**

See THEFT, p. 552.

**BANK REPORTS AND BALANCE SHEETS—FALSE.**

See BANK DIRECTOR, FRAUDULENT, p. 37.

**BEGGING—FRAUDULENT.**

Held in a suspension of a conviction upon a complaint for a contravention of section 4 of 5 Geo. IV., c. 83, 'An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' as amended and extended to Scotland by section 15 of 'The Prevention of Crimes Act, 1871,' that the whole of the provisions in said 4th section were extended to Scotland by the said 15th section, and not merely the clause in the former section which was amended by the latter: that the whole section being in force in Scotland, the suspender was therefore rightly convicted and sentenced upon the said complaint before a Sheriff of the offence of gathering or collecting alms under false pretences, and the Bill refused.—*M'Lean v. Murdoch*, High Court, December 22, 1882, p. 193.

---

**BY MEANS OF FALSE PRETENCES.**

See BEGGING, FRAUDULENT, p. 193.

**BETTING.**

Section 3 of The Betting Act, 1853, extended to Scotland by The Betting Act, 1874, enacts that 'any person who, being the owner or occupier of any house, office, or room, or other *place*, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person' for the purpose of betting, shall be liable in certain penalties.

The appellant was the proprietor of the Shawfield Recreation

**BETTING—continued.**

Grounds, twenty acres in extent, which were used for racing, and large numbers of the public were accustomed to go there, and among them a betting man (M'Gibbon), with whom numbers of the public made bets, and with the knowledge of the proprietor. A complaint was raised against the latter, charging him with an offence against sec. 3 of The Betting Act, 1853, in respect the Recreation Grounds was a 'place' in the sense of the statute of which he was the owner, and in which he allowed persons to bet. Held dissenting Lord Craighill, (1) that the grounds were not a 'house, office, room, or other place' within the meaning of the Act; and (2) even if the grounds were such a place, the proprietor was not liable under the Act as having permitted betting, notwithstanding that he saw betting being carried on by a professional book-maker who had come in along with the rest of the public, and did not take means to stop it.—*Henretty v. Hart*, High Court, 17th December 1885, p. 703.

**BETTING IN HOUSE, OFFICE, ROOM, OR OTHER PLACE**

See **BETTING**, p. 703.

**BOWING CONTRACT.**

See **CONTAGIOUS DISEASES, ANIMALS**, p. 267.

**BREACH OF CERTIFICATE—HOTEL.**

See **HOTEL KEEPING OPEN**, pp. 150 and 215.

---

**ENTERTAINING.**

See **BREACH OF CERTIFICATE**, p. 616.

---

**BY SERVANT.**

A hotel-keeper is not liable to conviction for a breach of his certificate in respect of an act done by a servant in his house in his absence and against his express instructions.

The keeper of an hotel having left his hotel on Sunday afternoon, gave a female servant charge of the premises, and left in her care some beer and whisky, with strict injunctions that she was to admit no one to the house except *bona fide* travellers, nor to give anyone, except *bona fide* travellers, beer or whisky. The servant, in her master's absence, admitted an acquaintance, and gave him a glass of whisky, taking the price of it from him and accounting for it to her master. The master was convicted of a contravention of his certificate, but the Court quashed the conviction.—*Greenhill v. Stirling*, High Court, 1885, p. 602.

---

**GROCCERS.**

A person holding a grocer's certificate was convicted of a breach of it, in so far as she had trafficked in or given a pint of ale to each of two persons named to be consumed on her premises.

**BREACH OF CERTIFICATE—GROCERS—*continued*.**

It was proved that she had 'gratuitously given the ale by way of a treat' to the two persons named in the kitchen behind her shop, between ten and eleven p.m.

Held that she had not 'given' the ale to be consumed on the premises in the sense of the Public-Houses Acts Amendment Act, 1862, and conviction therefore quashed.—*Kay v. Gemmell*, High Court, 13th November 1884, p. 535.

The holder of a grocer's certificate,—which prohibits the giving of, or trafficking in, spirits to be drunk or consumed on the licensed premises,—gave gratuitously and as hospitality to a friend, a glass of ale at 10 p.m. of the day libelled, which was consumed on the premises. Held that this did not amount to a giving to be consumed on the premises in the sense of the Act, and a conviction for breach of the certificate quashed accordingly.—*M'Petrie v. Cadenhead*, High Court, 19th March 1885, p. 616.

See **TRAFFICKING IN SPIRITS**, p. 33.

**BREACH OF THE PEACE.**

A Police Court complaint charging a man with having, within a hall occupied by the Salvation Army, and during a meeting of a branch of that Army, conducted himself in a riotous, outrageous, and disorderly manner, by then and there shouting and screaming at the top of his voice, or otherwise creating a noise and disturbance, whereby the said meeting was interrupted and disturbed, and a breach of the peace committed, held to be relevant, and a general conviction following thereon sustained.—*Hendry v. Ferguson*, High Court, 13th June 1883, p. 278.

See **SALVATION ARMY**, p. 174.

„ **MOBBING AND RIOTING**, p. 317.

**BREACH OF TRUST AND EMBEZZLEMENT.**

Held that where an agent is entrusted by a client with a deposit receipt for the purpose of investing the proceeds thereof, the agent is not entitled to uplift the money before the investment is ready, and mingle the amount received with his own funds without the consent of his client: and that where the agent so acts, and is charged with breach of trust and embezzlement, the question for the jury is whether the circumstances proved disclose a guilty intention on his part to appropriate the money to his own purposes.—*J. B. W. Lee*, High Court, 20th October 1884, p. 492.

See **BANK DIRECTOR, FRAUDULENT**, p. 37.

„ **FRAUDULENT BANKRUPT**, p. 473.

**BROKER.**

In an appeal by a person convicted 'of the offence libelled' upon a charge under sections 172, 184, and 200 of 'The Glasgow Police Act, 1866,' of having, within or near the premises occupied by him, carried on the trade of a broker within the meaning of said Act without having obtained a license so to do, by 'purchasing from some person or persons to the complainant unknown, second-hand articles or goods, viz., twenty-three and a half or thereby potato bags which had been in use.' Held that the complaint was relevant, but 2d (*dissentiente* Lord Craighill), that the single act of purchase proved was not sufficient to establish that the accused carried on the trade of a broker as defined by section 200 of the Statute.  
—*M'Mullan v. M'Phee*, High Court, June 9, 1882, p. 1.

**BROTHEL.**

See PROSTITUTES, HARBOURING, p. 210.

**BURGH.**

See STATUTE 20TH AND 21ST VIC., c. 73 (Smoke Nuisance Scotland Abatement Act, 1857), p. 152.

**BURGH MAGISTRATE.**

See SALVATION ARMY, p. 174.

„ STREETS AND ROADS, OBSTRUCTION OF, p. 497.

**BYE-LAW.**

See OMNIBUSES, STARTING OF, p. 16.

„ STATUTE 42ND AND 43RD VICT., c. cxxxii. (Edinburgh Municipal and Police Act, 1879), p. 160.

**CAUSE—DETERMINATION OF.**

See STATUTE 38TH and 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), p. 329.

**CERTIFICATION FROM CIRCUIT COURT.**

See BAIL, p. 346.

**CHARACTER OF WITNESS.**

In a suspension of a conviction of the crime of reset, *held* that it was competent for the Prosecutor to lead evidence as to the character of the person from whom the accused in his declaration stated that he had received the goods alleged to have been resetted, and who was not in the Crown list of witnesses, and, though cited for the panel, did not appear.—*Gracie v. Stuart*, High Court, 22nd Feb. 1884, p. 379.

**CHILDREN—EMPLOYMENT OF.**

See LOCOMOTIVES ON TURNPIKES, p. 186.

**CIVIL AND CRIMINAL.**

See JURISDICTION, p. 233.

„ STATUTE 38TH and 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), p. 329.

**CIVIL RIGHTS, COMPETING.**

See **SALMON FISHING**, p. 479.

**CLERICAL ERROR—IN CONVICTION.**

See **CONVICTION, DEFECT IN**, p. 365.

**CLOSE TIME.**

See **SALMON FISHING WITH LEISTER**, p. 495.

„ **SALMON FISHING**, p. 518.

„ **STAKE NETS**, p. 608.

**COLLECTING ALMS BY FRAUD.**

See **BEGGING, FRAUDULENT**, p. 193.

**COLLISION AT SEA.**

See **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM VESSEL**, p. 680.

**COMPETENCY.**

See **JURISDICTION**, p. 233.

„ **STATUTE 38TH and 39TH VIC., c. 62, SECS. 2 and 3** (Summary Prosecutions Appeals Act, 1875), p. 329.

„ **EXCISE PROSECUTION**, p. 354.

„ **CHARACTER OF WITNESS**, p. 379.

„ **NUISANCE, SMOKE**, p. 509.

**COMPLAINT.**

See **TRAFFICKING IN SPIRITS**, p. 33.

„ **STATUTE 29TH and 30TH VIC., c. OCLXXIII** (Glasgow Police Act, 1866), p. 147.

„ **OBSTRUCTING STREET**, p. 212.

„ **BREACH OF THE PEACE**, p. 278.

„ **CONTEMPT OF COURT**, p. 387.

„ **DEFORCEMENT**, p. 582.

**COMPUTATION OF TIME FOR APPEALING.**

See **STATUTE 38TH and 39TH VIC., c. 62, SEC. 3** (Summary Prosecutions Appeals Act, 1875), p. 274.

**CONCEALMENT OF DEAD BODY.**

See **VIOLATING SEPULCHRE**, p. 65.

**CONCEALMENT OF PROPERTY—FRAUDULENT.**

See **FRAUDULENT DEBTOR**, p. 48.

**CONSENT OF PRISONER.**

See **WITNESS NOT ON LIST**, p. 370.

**CONTAGIOUS DISEASES, ANIMALS.**

Held that the tenant of a farm who failed to give notice that the cows belonging to him on said farm were affected with foot and mouth disease was rightly and competently convicted before the Justices as being the person having the cows '*in his possession or under his charge*,' within the meaning of section 31 of the Contagious Diseases (Animals) Act, 1878, and as such bound to report the existence of said disease to the police, notwithstanding that it was proved that he did not reside at

CONTAGIOUS DISEASES, ANIMALS—*continued*.

the farm, and had let the cows upon it to his nephew, who resided there, on a bowing contract for payment of an annual sum for the milk of each cow, he, the bower, being bound to replace any cows which died.—*Robertson v. Local Authority of Perthshire*, High Court, 13th June 1883, p. 267.

## CONTEMPT OF COURT.

At the conclusion of the examination of a witness in an action in the Sheriff Court, under the Debts Recovery Act, 1867, the Sheriff ordered the pursuer to be taken into custody on the ground 'that he had disguised the truth and not told the whole truth,' and the following conviction and sentence was thereupon pronounced: 'The said witness having been duly sworn to tell the truth, and having grossly prevaricated in his evidence in the examination, the said Sheriff-substitute finds him guilty of contempt of Court, and therefore sentences and adjudges him to be imprisoned for the space of ten days from this date with hard labour.'

The witness brought a Bill of Suspension calling the Sheriff-substitute as respondent, and pleaded that the conviction and sentence was pronounced without any complaint setting forth the charge having been served upon him, and without a sufficient specification of the particular acts of prevarication of which he had been found guilty being set forth in the conviction. Counsel for the Sheriff-substitute stated to the Court that he had been advised that it was not consistent with his official position to appear as a party.

The Court (*diss.* Lord Young) refused the Bill, being of opinion (1) That the Sheriff had jurisdiction to proceed, *proprio motu*, and to punish, *de plano*, without complaint, for prevarication on oath committed before him; and (2) that it was unnecessary to set out in the warrant the particular acts warranting the conviction. Held (*diss.* Lord Young) that the Sheriff-substitute was right in not appearing as a party.—*Macleod v. Speirs*, High Court, 18th March 1884, p. 387.

## CONVICTION.

See **TRAFFICKING IN SPIRITS**, p. 33.

„ **PLEA OF GUILTY, UNAUTHENTICATED**, p. 132.

„ **PROCURATOR-FISCAL**, p. 284.

„ **CONTEMPT OF COURT**, p. 387.

---

**DEFECT IN.**

The record of a conviction in a Police Court bore that certain of the accused were 'to forfeit and pay the sum of twenty shillings each of penalty,' and that the others were 'to forfeit and pay the sum of fifteen each (*sic*) of penalty.' Fines of twenty and fifteen shillings respectively were paid.—In a sus-

**CONVICTION—DEFECT IN—*continued*.**

pension *held* that the omission of the word 'shillings' in the second case did not vitiate the conviction.—*Gallie and Others v. Ferguson*, High Court, 21st Nov. 1883, p. 365.

---

**WHERE PROCURATOR-FISCAL'S TITLE DISPUTED.**

See PROCURATOR-FISCAL, p. 284.

---

**FOLLOWING PARTLY UPON CONFESSION.**

A conviction upon a summary complaint which bore to proceed partly in respect of the judicial confession of guilt, and partly on the evidence adduced, suspended as radically null, and the bill held competent, notwithstanding the limitation of review in section 430 of the General Police Act of 1862, by virtue of which the conviction had been obtained. Held also that there had been, in the circumstances, no such acquiescence or delay on the part of the accused as to bar him from pleading the nullity.—*Cochran v. Ferguson*, High Court, October 27, 1882, p. 169.

---

**SIGNING.**

See CONVICTION FOLLOWING PARTLY ON CONFESSION, p. 169.

---

**UNDER STATUTE NOT SET FORTH IN INDICTMENT.**

See STATUTE 48TH AND 49TH VIC., c. 96, SECS. 1, 5, AND 9  
(Criminal Law Amendment Act, 1885), p. 696.

**CRIMEN CONTINUUM.**

See RESET, p. 379.

„ FUGITIVE, p. 649.

**CRIMEN VIOLATI SEPULCHRI.**

See VIOLATING SEPULCHRE, p. 65.

**CULPABLE HOMICIDE.**

Circumstances in which culpable homicide was held to be relevantly charged against two sets of officials of a railway company through whose separate and successive failures of duty a collision, resulting in the death of a passenger, was occasioned upon a section of the line worked upon the block system.—*George Little and Others*, Dumfries, 3rd April 1883, p. 259.

If a person is engaged in an unlawful act, or in the discharge of a lawful act in an unlawful way, and the death of another is the result, that in the abstract amounts to culpable homicide, even although the fatal result was mainly due to a combination of extraneous circumstances, and would not or might not, but for these extraneous circumstances, have happened.—*George Broadly*, Stirling, 3rd October 1884, p. 490.

Three panels were charged with assault with intent to ravage, and also with culpable homicide. The charge of culpable homicide was to the effect that, immediately after the assault with intent to ravage, the woman who had been assaulted



**CULPABLE HOMICIDE—*continued*.**

having risen and endeavoured to escape by running in the direction of a precipice, the panels, all and each, or one or more of them, did 'follow after and pursue' her to or near the edge of the precipice, and she did, 'while endeavouring to escape from' their pursuit, fall over the precipice and was killed.—Objection repelled that the charge was irrelevant in respect that no felonious intent in following after and pursuing was libelled, and that it was not specified that the falling over the precipice was the consequence of the following after.—*Patrick Slaven and Others*, High Court, 17th November 1885, p. 694.

See **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM VESSEL**, p. 68.

„ **POISONING, ACCIDENTAL**, p. 675.

**CULPABLE NEGLIGENCE**

See **POISONING, ACCIDENTAL**, p. 675.

**CULPABLE AND RECKLESS FIRE RAISING.**

See **WILFUL FIRE-RAISING**, p. 287.

**CULPABLE AND RECKLESS NEGLECT OF DUTY.**

See **NEGLECT OF DUTY, CULPABLE AND RECKLESS**, p. 259.

**DANGER TO LIFE.**

See **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM VESSEL**, p. 680.

**DATE, AMENDMENT OF.**

See **DEFORCEMENT**, p. 582.

**DEBTOR—CONCEALMENT OF EFFECTS BY.**

See **BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY**, p. 443.

---

**FRAUDULENT.**

See **FRAUDULENT DEBTOR**, p. 48.

---

**IN PROCESS OF SEQUESTRATION.**

See **FRAUDULENT BANKRUPT**, p. 665.

**DECREE IN ABSENCE.**

See **DECREE *in foro***, p. 670.

**DECREE BY DEFAULT.**

See **DECREE *in foro***, p. 670.

**DECREE *IN FORO*.**

When both parties have appeared at the first calling of a case in the Small Debt Court, any decree pronounced therein at a future diet, at which one of the parties does not attend, and is not represented, is not a decree *in absence*, but a decree by default. Held, therefore, that a sist in a warrant to cite the defender and witnesses, obtained on consignment of expenses decerned for in a decree of absolvitor pronounced on the failure of a pursuer to appear in a small debt action, was incompetent,

**DECREE IN FORO—continued.**

in respect that the parties to the action had been present at a previous diet in the Small Debt Court, when the case was continued; that the decree was, therefore, a decree *in foro*, and as such did not fall within the provisions for sisting decrees in absence in section 16 of the Small Debt Act.—*Worrall, Hallam, & Co., v. M'Dowall*, Glasgow, 29th August 1886, p. 670.

**DEFORCEMENT.**

Held that the offences in a summary complaint which charged the crimes of deforcement and assault might competently have been tried under Sir William Rae's Act (9 Geo. IV., c. 29) and were competently brought under the Summary Jurisdiction Acts: that an amendment of the date of the alleged offence was therefore competently made in terms of the provision in section 5 of the Summary Procedure Act, 1864, after trial had been begun, and the prosecutor's case closed, the accused having been offered an adjournment of the case, and the change of date making no difference in the character of the offence charged, nor causing any injustice.

In the course of the trial the Sheriff-substitute examined a person who was neither sworn nor cited by either side. Held that as what was then elicited was impertinent to the case, it did not afford a good ground of objection to the conviction.—*Matheson v. Ross*, High Court, 19th March, 1885, p. 582.

**DELAY AND ACQUIESCENCE.**

See CONVICTION FOLLOWING PARTLY UPON CONFESSION, p. 169.

**DESTROYING TREES.**

See PLEA OF GUILTY, UNAUTHENTICATED, p. 132.

**DESUETUDE.**

See SALVATION ARMY, p. 174.

**DRUGGIST ACCIDENTALLY SUPPLYING POISON.**

See POISONING, ACCIDENTAL, p. 675.

**EDUCATION ACTS.**

A complaint alleging a contravention of the Education Acts, 1872-1883, and praying for an attendance order, was brought under the Summary Jurisdiction Act, 1881, and was signed neither by the complainers (the School Board) nor a duly-qualified law-agent, as section 9 requires, but by an officer appointed by the School Board to report defaulters to them.

Held that the complaint was properly initiated.—*School Board of North Uist v. Macdonald*, High Court, 19th March, 1885, p. 614.

**EMBEZZLEMENT.**

See THEFT, p. 552.

**ENGINE DRIVER.**

See **CULPABLE HOMICIDE**, p. 259.

**EVIDENCE.**

See **STATUTE 42ND and 43RD VIC., c. cxxxii.** (Edinburgh Municipal and Police Act, 1879), p. 160.

---

**ADDITIONAL REMIT TO TAKE.**

See **OPPRESSION**, p. 471.

„ **REMIT TO SHERIFF**, p. 514.

---

**SHORTHAND WRITERS' NOTES OF.**

See **STATUTE 37TH AND 38TH VIC., c. 64, SECT. 4** (Evidence Amendment Scotland Act, 1874), p. 118.

---

**AS TO CHARACTER OF WITNESS.**

See **CHARACTER OF WITNESS**, p. 379.

---

**RECORDING IN CIVIL CASES.**

See **STATUTE 37TH AND 38TH VIC., c. 64** (Evidence Amendment (Scotland) Act, 1874) p. 118.

**EXCHEQUER.**

See **EXCISE PROSECUTION**, p. 354.

**EXCISE PROSECUTION.**

A person convicted upon a complaint brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, before two Justices sitting as a Court of Summary Jurisdiction, in terms of the Pawnbrokers Act, 1872, of having contravened section 6 thereof, in so far as, time libelled, 'he did in his shop' (a broker's) 'act as a pawnbroker within the meaning of said Act, *particularly* section 6 thereof, by taking a watch and chain with guinea attached in pawn,' from a person named and designed, 'without having in force a proper license from the Commissioners of Inland Revenue,' brought a Bill of Suspension before the High Court on the ground that the complaint, being neither relevant nor sufficiently specific, the conviction was inept, and was also further bad in respect that under the Summary Procedure Act, 1864, and the Pawnbrokers Act of 1872, it was competent only to award immediate imprisonment, in place of imprisonment after fourteen days, on failure to pay the penalty.

The respondent, the Public Prosecutor, objected to the competency of the Bill on the ground that the case was a Revenue one, and the only redress competent under the revenue statutes in such prosecutions was by way of appeal to the Quarter Sessions, and thereafter by appeal upon a Case stated for the opinion of the Court of Session as the Court of Exchequer.

Held that, as an offence punishable by penalty, or, failing payment, imprisonment, was sufficiently disclosed on the face of the complaint, it was not necessary to decide the question of

**EXCISE PROSECUTION—continued.**

competency raised, and the Bill of Suspension refused, with expenses.—*Hunter v. Maulam*, High Court, 21 Nov. 1883, p. 354.

**EXPENSES.**

See **TRADES UNION, UNREGISTERED**, p. 137.

„ **STATUTE 38TH and 39TH VIC., c. 62** (Summary Prosecutions Appeals Act), p. 329.

„ **PERJURY**, p. 350.

**EXPLOSIVES—KEEPING.**

The occupiers of a licensed store for mixed explosives, who had fully complied with all the structural requirements in the Explosives Act, 1875, to prevent accidents and the access of unauthorised persons, having been charged upon a complaint before the Sheriff with a contravention of sections 23 and 39 of the Act, in so far as they had failed, during a period specified, to take all due precaution for preventing unauthorised persons having access to said store, and particularly to provide a guard for preventing such persons from having access thereto, in consequence of which the store was entered on three specified occasions, and a large quantity of dynamite was stolen, the Sheriff, 'on the evidence, held that the respondents took all precautions obligatory or considered practicable at the time,' and found the charge not proven.

The Fiscal appealed, and contended that the Sheriff had fallen into an error in law in holding that the occupier of a store which had been proved to be structurally insufficient to prevent successful invasion by violence, had, in terms of the Act, taken all due precaution, where no provision was made for guarding the same.

Held that there was no question of law raised in the case, and the appeal dismissed.

Opinion, That the duty of guarding such a store, which has been made structurally sufficient to the satisfaction of the official inspector, does not fall upon the owner or occupier of the store but upon the police authorities.—*Dykes v. William Dixon, Limited*, High Court, 7th Feb. 1885, p. 539.

---

**DUE PRECAUTIONS TO GUARD STORES OF.**

See **EXPLOSIVES, KEEPING**, p. 539.

**EXTORTING MONEY—ATTEMPT AT.**

See **VIOLATING SEPULCHRE**, p. 65.

**FACTOR—APPROPRIATION OF MONEY BY.**

See **THEFT**, p. 552.

**FAILURE TO KEEP A LOOK OUT ON STEAM VESSEL.**

See **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM VESSEL**, p. 680.

**FALSEHOOD, FRAUD AND WILFUL IMPOSITION.**

See **BANK DIRECTOR, FRAUDULENT**, p. 36.

„ **FRAUDULENT DEBTOR**, p. 48.

**FALSIFYING BUSINESS BOOKS.**

See **FRAUDULENT DEBTOR**, p. 48.

**FINE—AMOUNT OF.**

See **CONVICTION, DEFECT IN**, p. 365.

**FINE AND IMPRISONMENT.**

See **STAKE NETS**, p. 608.

**FIRE-RAISING—WICKED, CULPABLE, AND RECKLESS.**

See **WILFUL FIRE-RAISING**, p. 287.

**FISHING WITH ROD.**

See **SALMON FISHING**, p. 518.

„ **SALMON FISHING WITH LEISTER**, p. 595.

**FOOT AND MOUTH DISEASE—FAILURE TO GIVE NOTICE OF.**

See **CONTAGIOUS DISEASES, ANIMALS**, p. 267.

**FOREIGN.**

See **FUGITIVE**, p. 649.

**FORFEITURE OF BAIL-BOND.**

See **BAIL**, p. 346.

**FORM—WANT OF.**

See **PLEA OF GUILTY, UNAUTHENTICATED**, p. 132.

„ **CONVICTION FOLLOWING PARTLY UPON CONFESSION**, p. 169.

**FRAUDULENT BANKRUPT.**

Two wool brokers having been charged under 'The Debtors (Scotland) Act, 1880,' section 13, subsections (A) 5 and (B) 3, with having when insolvent, and within four months prior to petitioning for sequestration, obtained on credit in pursuance of a fraudulent scheme, large quantities of wool without paying or intending to pay therefor, and with paying with the proceeds thereof various persons from whom they had received previous consignments of wool on sale or commission, which they had sold, but had failed to account for the price thereof; and also with paying, out of said proceeds, debts due by them to relatives and friends. And having been further charged, also under said 13th section, (A) 5, with having, within four months prior to the presentation of their petition for sequestration, pledged or disposed of, otherwise than in the ordinary way of trade, certain parcels of wool, being portions of the wool obtained on credit as libelled in the previous charge, and not paid for, and with intent to defraud their creditors. The libel was found relevant without objection taken, and the panels pleaded guilty to a portion of the first-mentioned charge, and to the second mentioned charge as libelled; and sentence of twelve months' imprisonment was pronounced

**FRAUDULENT BANKRUPT—continued.**

upon each of them.—*David McGregor and Another*, High Court, July 21, 1884, p. 473.

A person who was neither a debtor in a process of sequestration or cessio nor insolvent, having been convicted of the offence specified in section 13 of The Debtors Act, 1880, on the ground that he had assisted such a debtor, of whose position and fraudulent design he had full knowledge, to conceal his effects: The Court suspended the conviction, on the ground that a person so assisting, not being a debtor in the sense of section 13, viz., a debtor in a process of sequestration or cessio, he could not competently be convicted under it.—*Robertsons v. Caird*, High Court, 12th August 1885, p. 665.

See FRAUDULENT DEBTOR, p. 293.

**FRAUDULENT BEGGING.**

See BEGGING, FRAUDULENT, p. 193.

**FRAUDULENT DEBTOR.**

A retail jeweller having obtained articles of jewellery on approbation or on sight from a wholesale jeweller, by means of false and fraudulent representations and pretences, and by exhibiting business books containing false entries, systematically pawned them, and on being charged with theft, or alternatively with falsehood, fraud, and wilful imposition, he objected to the relevancy of the charge of theft that the property of the articles having passed he committed no theft by pawning them. Held that the property had not passed, and the objection repelled. Objection also that the false representations and pretences libelled were not such as could deceive, and, at all events, were not sufficiently specific, as, especially, it was not set forth wherein the falsification consisted, repelled.

Objections to the relevancy of charges of having contravened section 13 of The Debtors (Scotland) Act, 1880, sub-sections 3, 4, and 5, that the minor proposition of the indictment was vague, and not sufficiently specific in various particulars, repelled; but observed that the charges were not correctly libelled.

Question—Whether the offence in sub-section 5 of section 13 of The Debtors (Scotland) Act, 1880, is relevantly libelled by using the alternatives in the Statute, and charging that the panel—a debtor in a process of sequestration—did, within the time specified in the Act, *pawn, pledge, or dispose of otherwise than in the ordinary way of trade*, the articles libelled, being property obtained on credit and which had not been paid for, or whether the particular mode in which the property was disposed of must be specified?—*Wm. Wilson*, High Court, July 3, 1882, p. 48.

**FRAUDULENT DEBTOR—continued.**

It is enacted by section 13, sub-section (A) 1, of The Debtors (Scotland) Act, 1880, that a debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, unless he proves that he had no intent to defraud, if he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs, in terms of The Bankruptcy (Scotland) Act, 1856, or the Cessio Act, as the case may be.—Held that there are three essential elements in the above enactment, which ought to be set forth in a charge of the said crime and offence, viz :—First, what the true state of the affairs of the accused was ; second, that he knew and believed it to be so ; and, third, that he did not disclose.

Terms of an indictment charging said crime and offence, which was held to be relevant, and which it was held contained a sufficient averment of knowledge and belief, and also of property and possession, on the part of the accused.

The Debtors (Scotland) Act, 1880, sec. 13, sub-sec. (A) 2, enacts that a debtor in a process of sequestration or cessio shall be guilty of a crime and offence, unless he proves that he had no intent to defraud, if he does not deliver up to the trustee in his sequestration ‘all his property and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up.’

An indictment under this enactment charging the accused with not having delivered up the books, documents, &c., forming the vouchers of certain sums specified, held irrelevant, in respect it was not alleged that such books, documents, &c., had ever existed.—*William Simpson*, High Court, 16th July 1883, p. 293.

**FUGITATION.**

See **BAIL**, p. 346.

**FUGITIVE.**

Held that when a warrant endorsed by one of Her Majesty's Secretaries of State, duly authenticated, is presented to a magistrate under The Fugitive Offenders Act, 1881, it must be received by him as a warrant regular and valid in all respects.

A warrant endorsed by one of Her Majesty's Secretaries of State bore that, from information taken upon oath before a magistrate in one part of Her Majesty's dominions, there were reasonable grounds of suspicion that a person named did, on a day named, ‘commit the crime of murder.’

Held that this warrant, although the name of the person murdered was not given, nor the *locus* mentioned, nor any state-



**FUGITIVE—continued.**

ment made that the *locus* was within Her Majesty's dominions, must be received by the Sheriff to whom it was presented under The Fugitive Offenders Act, 1881, as valid and regular in all respects.

In the depositions and oral evidence put before a magistrate under the 5th and 6th sections of The Fugitive Offenders Act, 1881, there was evidence that the fugitive had an interest in preventing the appearance of the person alleged to have been murdered at a trial shortly to take place in the British Colony of the Cape of Good Hope; that the fugitive and the deceased left British territory together; that the former had severely beaten and afterwards handcuffed the latter, not, however, on British territory; and that a body, said to be the body of the person who had been so treated, was found about a fortnight afterwards in a well on British territory. Held that the evidence raised 'a strong or probable presumption' (1) that the fugitive had committed the offence charged against him, and mentioned in the warrant for his apprehension, viz., murder; and (2) that the offence had been committed in Her Majesty's dominions, and that the case thus fell under the provisions of the Act.—*Carlin v. Government of Cape Colony*, High Court, 18th July 1885, p. 649.

**GATHERING OR COLLECTING ALMS.**

See **BEGGING, FRAUDULENT**, p. 193.

**GROCER'S LICENSE.**

See **TRAFFICKING IN SPIRITS**, p. 33.

„ **BREACH OF CERTIFICATE**, pp. 535 and 616.

**GROUND GAME.**

See **STATUTE 43RD AND 44TH VIC.**, c. 47, p. 526.

**GUEST—SUPPLYING LIQUOR TO.**

See **HOTEL, KEEPING OPEN**, pp. 150, 215, and 616.

**HACKNEY CARRIAGE.**

See **OBSTRUCTING STREET**, p. 212.

**HARBOUR.**

See **STATUTE 20TH AND 21ST VIC.**, c. 73 (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

**HARBOURING PROSTITUTES.**

See **PROSTITUTES, HARBOURING**, pp. 18 and 210.

**HERITABLE RIGHT.**

The proprietor of a house having been convicted upon a charge before a Police Court under the 251st section of The General Police and Improvement (Scotland) Act, with obstructing the footway of a public street by means of a stall loaded with

**HERITABLE RIGHT—continued.**

flowers, objected to the jurisdiction of that Court on the ground that, as the part of the street on which the obstruction was said to have existed was, he alleged, his private property, a question of heritable right was involved; and having presented a Bill of Suspension he declined to raise the question of heritable right in a proper civil process, whereupon the Court refused the Bill.—*M'Donald v. White*, High Court, 9th June 1882, p. 19.

See **SALMON FISHING**, p. 305.

**HERRING BARREL.**

The 12th section of the Act 55 Geo. III., cap. 94, enacts that no white herrings shall be cured, packed, or put up in Great Britain in any barrel which, *inter alia*, shall not contain 32 gallons English wine measure.

Held that a fish-curer had contravened the Act by curing and packing barrels under the specified size, although he had not tendered them for branding or offered them for sale.—*Lowdon v. Ingram*, High Court, 15th July 1884, p. 458.

**HERRING BRAND—GOVERNMENT.**

See **HERRING BARREL**, p. 458.

**HOTEL—KEEPING OPEN.**

An hotel-keeper who permitted two *bona-fide* lodgers in his hotel to entertain, after eleven o'clock at night, two friends who lived in the vicinity with exciseable liquors, the same being supplied before eleven, was acquitted upon a charge, under The Public Houses Acts Amendment (Scotland) Act, 1862, of keeping open house after eleven o'clock at night, at the instance of the Procurator-fiscal, and the latter appealed. Appeal dismissed, with costs, and observed that the case differed from the case where it is proved that lodgings were taken in the hotel to enable exciseable liquors to be obtained during prohibited hours.—*Gemmell v. Fleck*, High Court, Oct. 27, 1882, p. 150.

A conviction set aside on appeal which convicted generally 'of the contravention charged,' upon a complaint which charged an hotel keeper, whose certificate was in the form of Schedule A of The Public Houses Act Amendment (Scotland) Act, 1862, with breach of certificate by keeping open house, or, alternatively, with permitting or suffering drinking on his premises not for the refreshment of travellers or persons lodging in the hotel. And opinion per the Lord Justice-Clerk and Lord Young, that breach of certificate is not committed by an hotel keeper who supplies whisky to the guest of a lodger in the hotel upon the order of the latter after eleven o'clock, in circumstances which did not infer that the guest

**HOTEL—KEEPING OPEN—*continued*.**

had been brought to the hotel for the purpose of evading the statute.—*Murray v. M'Dougall*, High Court, Feb. 7, 1883, p. 215.

See BREACH OF CERTIFICATE BY SERVANT, p. 602.

**—— BONA FIDE LODGER IN.**

See HOTEL, KEEPING OPEN, pp. 150 and 215.

**IMPRISONMENT—IMMEDIATE.**

A publican convicted, under The Public Houses Act, of a second offence in breach of the terms of her certificate, was sentenced to pay a penalty, and in default of *immediate* payment to imprisonment for thirty days. She paid the penalty, and appealed.

Held (following *Rhodes v. Ross*, High Court, Sept. 23, 1870, Couper, vol. i. p. 469) that the conviction and sentence was bad, as section 21 of The Home-Drummond Act allowed a person convicted of a second offence fourteen days for payment of the penalty, and the part of the sentence inflicting imprisonment was incapable of being separated from that which imposes the penalty.—*Ritchie v. Brown*, High Court, 22nd Feb. 1884, p. 374.

See EXCISE PROSECUTION, p. 354.

„ CONTEMPT OF COURT, p. 387.

**INCOMPETENCY, INCLUDING DEFECT OF JURISDICTION.**

See SMALL DEBT, p. 221.

**INDUSTRIAL SCHOOL—DETENTION IN.**

A magistrate having granted orders under The Industrial Schools Act, 1866, for the detention of three children in an industrial school, as being subject to the provisions of the Act; and the children having been detained thereon, a claim under section 38 of the statute for the expense of maintaining them was subsequently made by the Inspector of Industrial Schools against the Inspector of the Poor of the parish to which they were alleged to be chargeable as paupers, whereupon the Inspector of the Poor presented a Bill in the High Court of Justiciary for suspension of the said orders, on the ground of irregularity in the proceedings, and of incompetency by reason of the children not being chargeable as paupers.

Held that the suspender had no title to insist, as it appeared that as the children had never been chargeable to the Parish of which he was Inspector, they did not fall within the provisions of section 38, and the Bill dismissed.—*Deas v. Stewart*, High Court, 10th July 1885, p. 638.

**EXPENSE OF MAINTENANCE IN.**

See INDUSTRIAL SCHOOL, DETENTION IN, p. 638.

**INFAMY—DECLARATION OF.**

Held in a suspension of a conviction and sentence pronounced in the Sheriff-Court upon a charge of perjury, to which sentence a declaration of infamy was added, that it was incompetent to pronounce such a declaration in the Sheriff-Court, but that being separable from the rest of the sentence it might be expunged therefrom without vitiating the whole, and on the motion of the respondent, the Procurator-Fiscal, it was allowed to be expunged accordingly.—*Roberts v. Henderson*, High Court, October 25, 1882, p. 118.

**INFORMER.**

See STATUTE 8 and 9 VIC., c. 33, SEC. 142, p. 463.

**INSPECTOR OF POOR—TITLE TO SUE OF.**

See INDUSTRIAL SCHOOL, DETENTION IN, p. 638.

**INSPECTOR OF REFORMATORY AND INDUSTRIAL SCHOOLS.**

See INDUSTRIAL SCHOOL, DETENTION IN, p. 638.

**INSTANCE.**

A Procurator-fiscal of the Justice of Peace Court brought a complaint charging a contravention of section 18 of The Salmon Fisheries (Sootland) Act, 1868, in his name as 'Procurator-fiscal of Court.' The Justices dismissed the complaint, in respect he was not a 'clerk of a District Board,' nor 'any other person' in the sense of section 30 of the Act. Held, reversing the determination of the Justices, that the instance was good.—*Gemmell v. Hadden*, High Court, 10th July 1885, p. 622.

A Procurator-fiscal may prosecute in the Sheriff-Court in a complaint charging an offence against the Sea Fisheries Act, 1883.—*Nicholson v. Yoole*, High Court, July 10, 1885, p. 628.

See EDUCATION ACTS, p. 614.

„ INSPECTOR OF POOR—TITLE TO SUE OF, p. 638.

**INTENT.**

See CULPABLE HOMICIDE, p. 694.

**INTENT TO DEFRAUD INSURANCE COMPANY.**

SEE WILFUL FIRE-RAISING, p. 451.

**INTENTION.**

SEE WILFUL FIRE-RAISING, pp. 287 and 451.

**INVADING LOCKFAST PREMISES.**

See MOBING AND RIOTING, p. 124.

**JURISDICTION.**

A person decerned against in an action before the Sheriff Court upon an I.O.U. for the sum of £20 proposed to refer the cause and the resting-owing to the pursuer's oath, which was refused, and on being charged to make payment, he suspended on the

**JURISDICTION—continued.**

ground that by the Sheriffs having incompetently refused to allow the reference to oath, they had in effect declined their jurisdiction, and review by the High Court of Justiciary was therefore competent.—Held that the Sheriffs had not declined their jurisdiction, and that upon that ground the Bill fell to be dismissed, apart from any question as to the jurisdiction of the High Court of Justiciary to review the judgments of Sheriffs in purely civil cases, opinion upon which question was by a majority reserved.

Opinion (per Lord Young) that the judgments sought to be suspended having been pronounced in a purely civil case before the Sheriff Court, concluding for a sum above Twelve pounds, the High Court had no jurisdiction to review the same by way of Suspension or otherwise.—*Traill v. Chalmers*, High Court, 7th Feb. and 14th March 1883, p. 233.

---

**BURGH COURT.**

See STATUTE 20TH and 21ST VIC., c. 73 (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

---

**OF SHERIFF.**

See INFAMY, DECLARATION OF, p. 118.

„ MOBING AND RIOTING, p. 124.

„ TRADES UNION, UNREGISTERED, p. 137.

„ SMALL DEBT, p. 221.

„ EXCISE PROSECUTION, p. 354.

„ RESET, p. 379.

„ SALMON FISHING, p. 479.

**KEEPING OPEN HOUSE.**

SEE HOTEL, KEEPING OPEN, pp. 150 and 215.

**KNOWLEDGE AND BELIEF.**

See FRAUDULENT DEBTOR, p. 293.

„ BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY, p. 443.

**LICENSE.**

See BROKER, p. 1.

„ PUBLIC ENTERTAINMENT, p. 303.

**LOCOMOTIVES ON TURNPIKES.**

The Locomotives Act, 1865, section 3, as amended by The Locomotives Amendment (Scotland) Act, 1878, section 4, enacts that at least three persons shall be employed to drive or conduct every locomotive propelled by steam on any turnpike road, and that one of such persons, while the locomotive is in motion, shall accompany the locomotive on foot, and shall in case of need assist horses and carriages drawn by horses passing the same.

**LOCOMOTIVES ON TURNPIKES—*continued*.**

In an appeal against a conviction and sentence pronounced upon a complaint for a contravention of these sections, it was objected that the Justices having found it proved that two competent persons were in charge upon the locomotive in question on the occasion libelled, and that a boy of thirteen, who was in the habit of taking charge of horses, was in advance of said locomotive at the time, it was incompetent, in terms of these provisions, to convict of the contravention charged: Held that the Justices having found in substance that in point of fact the provisions of the statutes had not been complied with, the conviction was competent, and the Court was not called upon to determine the general question whether the employment of a boy of thirteen years of age, to precede a locomotive on foot, was a compliance with the requirements of the statutes libelled.

Opinion per Lord Craighill, that on the question of law the Justices were right.—*Smith v. Wood*, High Court, Dec. 6, 1882, p. 186.

See **STEAM ENGINE NEAR TURNPIKE ROAD**, p. 225.

„ **EXCISE PROSECUTION**.

**LOCUS.**

See **THEFT**, p. 552.

„ **FUGITIVE**, p. 649.

**LODGER IN HOTEL ENTERTAINING GUEST.**

See **HOTEL, KEEPING OPEN**, pp. 150 and 215.

**MAGISTRATE—POLICE.**

See **CONVICTION FOLLOWING PARTLY UPON CONFESSION**, p. 169.

---

**POWERS OF.**

See **OMNIBUSES, STARTING OF**, p. 16.

„ **SALVATION ARMY**, p. 174.

**MALICIOUS MISCHIEF.**

See **PLEA OF GUILTY, UNAUTHENTICATED**, p. 132.

**MASTER AND MATE OF STEAM VESSEL.**

See **NEGLECT OF DUTY; CULPABLE AND RECKLESS**, pp. 438 and 680.

**MASTER AND SERVANT.**

See **BREACH OF CERTIFICATE BY SERVANT**, p. 602.

**MEETING—RELIGIOUS.**

See **BREACH OF THE PEACE**, p. 278.

**MINOR PROPOSITION—SUBSUMPTION OF.**

See **AGGRAVATION**, p. 31.

## MOBBING AND RIOTING.

Objection, that it was incompetent for a Sheriff to try, under The Summary Jurisdiction (Scotland) Acts, 1864 and 1881, charges of mobbing and rioting, and breach of the peace, and taking violent and masterful possession of lockfast premises, repelled.

Terms of a summary complaint charging two persons with these crimes, by being present, and actively engaged with, and aiding and abetting a mob in the actual perpetration of the offences, upon which it was held, on appeal, that the Sheriff had competently convicted the accused of breach of the peace and taking violent and masterful possession of lockfast premises after the charge of mobbing and rioting had been withdrawn by the prosecutor. It being held that the personal charges under which the accused were convicted were separable from the charge of mobbing and rioting.—*Mackenzie and Another v. Fraser*, High Court, 25th October 1882, p. 124.

Circumstances in which ten persons, who assembled with a crowd at a pier for the purpose of preventing what they considered to be Sabbath desecration, by overpowering the police, and riotously and tumultuously preventing the unloading at said pier upon a Sunday of fish from steamboats for transmission by rail, were convicted of mobbing and rioting, and received sentence of imprisonment for four calendar months.—*Alexander Gollan and others*, High Court, 24th July 1883, p. 317.

## MODUS.

See FRAUDULENT DEBTOR, p. 48.

„ CULPABLE HOMICIDE, p. 694.

„ STATUTE 48TH and 49TH VIC., c. 69 (Criminal Law Amendment Act, 1885), p. 696.

„ ATTEMPTING TO HAVE UNLAWFUL CARNAL KNOWLEDGE, p. 722.

## MORA.

See CONVICTION FOLLOWING PARTLY UPON CONFESSION, p. 169.

## MURDER.

See THOLING ASSIZE, p. 286.

## NAVIGATING STEAM VESSEL.

See NEGLIGENCE OF DUTY, CULPABLE AND RECKLESS, p. 483.

## NEGLECT OF DUTY—CULPABLE AND RECKLESS.

An indictment charged the master and mate of a steam-vessel with culpable and reckless neglect of duty while navigating the vessel in a public harbour. Objection, that the minor proposition was not sufficiently specific, and especially that it did not distinguish the respective duties of master and mate, repelled.



**NEGLECT OF DUTY—CULPABLE AND RECKLESS—*continued*.**

Observed (*per* the Lord Justice-Clerk), that when a steam-vessel in motion comes into collision with a stationary vessel, and particularly with a vessel at anchor during daylight, there is a presumption that the former was negligently managed.—*Archibald Grassom and Another*, Inveraray, 30th Sept. 1884, p. 483. See CULPABLE HOMICIDE, p. 259.

„ NEGLECT OF DUTY BY MASTER AND MATE, p. 680.

---

**BY MASTER AND MATE OF STEAM-VESSEL.**

An indictment which charged the master and mate of a steam-vessel with culpable homicide, or culpable and reckless neglect of duty, set forth that it was the duty of the captain to navigate the vessel with due care and caution, and of the mate to assist the captain therein, and, in particular, to keep a good look-out, yet in breach of these duties they did steer in a reckless manner, and fail to keep a good look-out, with the result that a collision occurred and life was lost. Objection repelled that there was no specification of the precise act which had been done or omitted, and on the doing or not doing of which the Crown proposed to found.

At the trial of the master and mate of a steam-vessel, charged with culpable homicide, or culpable and reckless neglect of duty by failing to keep a good look-out, the charge to the Jury was that where a person is charged with a duty involving the safety of human life, he is *criminally* liable only for a notable and serious fault or neglect—or *culpa lata*—and not on account merely of a slight fault or negligence.

Circumstances in which a motion for separation of trials was granted.—*William Drever and Another*, High Court, 2nd Nov. 1886, p. 680.

See NEGLECT OF DUTY, CULPABLE AND RECKLESS, p. 483.

**NET—FISHING WITH.**

See SALMON FISHING, p. 518.

**NUISANCE—SMOKE.**

The master of a steam-vessel charged before the Magistrates of a Burgh with an offence under sections 1 and 2 of The Smoke Nuisance Abatement Act (20 and 21 Vic., c. 73) upon a complaint under The Summary Jurisdiction (Scotland) Acts, 1864, and 1881, on being convicted of ‘the offence charged,’ brought a Bill of Suspension in the High Court, and pleaded *inter alia* that the charge being alternative the conviction was void: and further, that the complaint must be held not to have been brought, nor the conviction to have been obtained under, or by virtue of the Smoke Nuisance Act libelled, and that the limitations of review therein did not therefore apply, and the Bill was competent.

## OUTLAWRY, SENTENCE OF.

See BAIL, p. 346.

## PAWNBROKER.

See EXCISE PROSECUTION, p. 354.

## PAWNING, PLEDGING, OR DISPOSING, OF PROPERTY BY FRAUDULENT DEBTOR.

See FRAUDULENT DEBTOR, p. 48.

## PENALTY.

See STATUTE 38TH and 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), p. 329.

„ APPEAL, p. 420.

„ STATUTE 8TH and 9TH VIC. c. 33, SEC. 142, p. 463.

## ———— MINIMUM.

See NUISANCE, SMOKE, p. 509.

## ———— PAYMENT OF, WITHIN FOURTEEN DAYS.

See IMPRISONMENT, IMMEDIATE, p. 374.

## PERJURY.

A conviction and sentence upon a charge of perjury suspended (notwithstanding that no objection to the relevancy had been taken before the Sheriff) on the ground that what was charged did not amount to a crime in respect that what the accused were stated in the minor proposition to have falsely deposed to was not consistent with what was there alleged as the true state of the facts.—*Bole and Others v. Stevensons*, High-Court, 2nd Nov. 1883, p. 350.

See INFAMY, DECLARATION OF, p. 118.

## PERSON.

See LOCOMOTIVES ON TURNPIKES, p. 186.

## PLEA IN BAR OF TRIAL.

See THOLING ASSIZE, p. 206.

## ———— OF GUILTY, UNAUTHENTICATED.

The plea upon which a conviction and sentence pronounced in a Justice of Peace Court on a complaint under The Summary Jurisdiction (Scotland) Acts, 1864 and 1881, not having been authenticated in terms of the 14th section of The Summary Procedure Act, 1864, the accused brought a suspension. They admitted that they had actually tendered the plea, and the conviction bore to proceed ‘in respect of the judicial confession of the respondents.’ The Court (*dub.* Lord Justice-Clerk) *refused* the bill, being of opinion that, as the accused admitted that they had tendered the plea, the objection resolved itself into an objection to want of form of the class contemplated by section 34th of the Act of 1864.

In a Justice of Peace Court two persons pleaded guilty to the crime of malicious mischief in having destroyed seven trees growing near a high road, the property of a private person.

OBSTRUCTION, ANNOYANCE, OR DANGER—*continued*.

intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.'

A complaint bore that the accused had contravened this enactment, in so far as he had used 'abusive or insulting words towards J. F., to wit, "You are a damn beast," whereby such words so used were calculated to provoke a breach of the peace.' The accused, having been convicted, brought a suspension, pleading that the complaint was irrelevant, in respect that it did not set forth that the words were used to the obstruction, annoyance, or danger of the residents or passengers. The Court *suspended* the conviction.—*Stirling v. Murray*, High Court, 13th June 1883, p. 265.

See OBSTRUCTING STREET, pp. 19 and 212.

## OMNIBUSES—STARTING OF.

The Magistrates of a Burgh having, in virtue of the powers conferred by section 309 of The General Police and Improvement (Scotland) Act, 1862, framed and enacted bye-laws for the regulation of omnibuses, of which Bye-law V. enacted that 'all omnibuses shall stand in and depart from' a particular square. A proprietor of omnibuses in the Burgh who started his omnibuses from his own yard without causing them first to stand in said square, upon being convicted and sentenced for having contravened the said bye-law, appealed. Held that although the Magistrates might fix by a bye-law a stance at which omnibuses shall stand and from which they shall start, it was *ultra vires* to compel all omnibuses to stand at the stance so fixed before starting, where proprietors desired that they should start from another place; and the conviction and sentence quashed accordingly.—*King v. Hart*, High Court, June 9, 1882, p. 16.

## OPPRESSION.

In a suspension of a conviction for day poaching, the suspender alleged that he had only received a copy of the complaint on the day before the trial, and that the Sheriff had oppressively refused a motion by him for an adjournment in order that he might adduce witnesses to instruct his averment that at the time when the offence charged was said to have been committed he was not within sixty miles of the *locus delicti*.

The Court, before answer, *remitted* to the Sheriff to investigate into the allegations with reference to the alleged *alibi*, and on a report by the Sheriff that, in his opinion, the *alibi* had been proved, *suspended* the conviction.—*Ferguson v. M'Nab*, High Court, 19th July 1884, p. 471.

## OPPRESSIVE SENTENCE.

See PLEA OF GUILTY UNAUTHENTICATED, p. 132.

**OUTLAWRY, SENTENCE OF.**

See BAIL, p. 346.

**PAWNBROKER.**

See EXCISE PROSECUTION, p. 354.

**PAWNING, PLEDGING, OR DISPOSING, OF PROPERTY BY  
FRAUDULENT DEBTOR.**

See FRAUDULENT DEBTOR, p. 48.

**PENALTY.**

See STATUTE 38TH and 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), p. 329.

„ APPEAL, p. 420.

„ STATUTE 8TH and 9TH VIC. c. 33, SEC. 142, p. 463.

———— MINIMUM.

See NUISANCE, SMOKE, p. 509.

———— PAYMENT OF, WITHIN FOURTEEN DAYS.

See IMPRISONMENT, IMMEDIATE, p. 374.

**PERJURY.**

A conviction and sentence upon a charge of perjury suspended (notwithstanding that no objection to the relevancy had been taken before the Sheriff) on the ground that what was charged did not amount to a crime in respect that what the accused were stated in the minor proposition to have falsely deponed to was not consistent with what was there alleged as the true state of the facts.—*Bole and Others v. Stevensons*, High Court, 2nd Nov. 1883, p. 350.

See INFAMY, DECLARATION OF, p. 118.

**PERSON.**

See LOCOMOTIVES ON TURNPIKES, p. 186.

**PLEA IN BAR OF TRIAL.**

See THOLING ASSIZE, p. 206.

———— OF GUILTY, UNAUTHENTICATED.

The plea upon which a conviction and sentence pronounced in a Justice of Peace Court on a complaint under The Summary Jurisdiction (Scotland) Acts, 1864 and 1881, not having been authenticated in terms of the 14th section of The Summary Procedure Act, 1864, the accused brought a suspension. They admitted that they had actually tendered the plea, and the conviction bore to proceed ‘in respect of the judicial confession of the respondents.’ The Court (*dub.* Lord Justice-Clerk) *refused* the bill, being of opinion that, as the accused admitted that they had tendered the plea, the objection resolved itself into an objection to want of form of the class contemplated by section 34th of the Act of 1864.

In a Justice of Peace Court two persons pleaded guilty to the crime of malicious mischief in having destroyed seven trees growing near a high road, the property of a private person.

## PROSTITUTES—HARBOURING.

Objection in an appeal under The Summary Prosecutions Appeals Act, to a complaint under sections 137 and 142 of The Glasgow Police Act, 1866, charging the harbouring of prostitutes for the purpose of prostitution, that the charge used the words of the Statute only, and was wanting in specification—repelled.

Objection also, that the fact of one prostitute being found in a house along with the appellant, who was herself a prostitute, did not constitute the offence libelled, also repelled, and the appeal dismissed.—*Milton v. M'Phee*, High Court, October 27, 1882, p. 165.

Held that it was unnecessary, in a conviction following upon a complaint which charged the two offences under section 258 of The Edinburgh Municipal and Police Act, 1879, of keeping and managing a brothel, and of knowingly harbouring prostitutes, to find the accused guilty of each offence by separate findings, and in the sentence to separate the amount of penalty applicable to each; and a conviction following upon such a complaint sustained, which found the complaint proved and sentenced to a *cumulo* penalty with imprisonment for a period mentioned until said fine be paid.—*Prentice v. Linton*, High Court, February 7, 1883, p. 210.

## PUBLIC ENTERTAINMENT.

The 287th section of The Edinburgh Municipal and Police Act, 1879, enacts that 'the magistrates may license any house, building, or other premises to be used for any public show, exhibition, circus, or other representation or public entertainment,' under such regulations and conditions as they think fit, and that every person opening any public show, &c., without a license shall be liable in a penalty.

Certain premises were open nightly (excepting Sunday) from seven till twelve o'clock to anyone on payment of sixpence, in return for which a ticket was given, entitling the holder to one refreshment, such as a cup of coffee or a glass of lemonade. Additional refreshments might be obtained on further payment. The refreshments were served in a large room capable of accommodating upwards of 200 persons, and provided with small tables and chairs. Music was played at intervals during the evening, the performers being stationed on a raised platform at one end of the room.

Held that these premises were not used for a public entertainment in the sense of the Act, and did not require a license.—*Linton v. Beaumont*, High Court, 18th July 1883, p. 303.

## PUBLIC HEALTH.

See ADULTERATION OF MILK, p. 409.

**PUBLIC HOUSE.**

See **TRAFFICKING IN SPIRITS**, p. 33.

„ **WEIGHTS AND MEASURES, AND STATUTE 38TH AND 39TH VIC.**,  
c. 62, SECS. 2 AND 3 (Summary Prosecutions Appeals  
Act, 1875), p. 243.

„ **IMPRISONMENT, IMMEDIATE**, p. 374.

„ **BREACH OF CERTIFICATE**, pp. 535, 602, 616.

**QUESTION OF FACT.**

See **EXPLOSIVES KEEPING**, p. 539.

**QUESTION OF LAW.**

See **ADULTERATION OF MILK**, p. 409.

**RABBITS—PERSON AUTHORISED TO SHOOT.**

See **STATUTE 43RD AND 44TH VIC.**, c. 47, p. 526.

**RACE COURSE—BETTING ON.**

See **BETTING**, p. 703.

**RAILWAY.**

See **CULPABLE HOMICIDE**, p. 259.

————— **INTERFERENCE WITH CARRIAGE-WAY BY.**

A private Act of Parliament which empowered a company to construct an underground railway within a city, and for the purposes of their undertaking to interfere with and open up the carriage-way of streets, enacted that if such carriage-ways should not be restored within three months, the company should be liable in a penalty recoverable on summary application ‘by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored.’

Held that it was sufficient to give the owner or tenant of a corner house a title to recover the penalty that the obstruction was partly opposite the area, though the portion of street opposite the house itself was clear of obstruction.

A private Act of Parliament which empowered a company to construct an underground railway within a city, enacted that the penalty incurred by the company for not restoring within a certain time the carriage-way of streets which they were authorised to interfere with, should be recoverable ‘by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored.’ The private Act incorporated The Railway Clauses Consolidation (Scotland) Act, 1845.

Held that a proprietor or tenant proceeding for the recovery of these penalties was in the position of an informer for the public interest, and, consequently, that half the penalty was properly apportioned to the poor of the parish under sec. 142 of The Railway Clauses Consolidation Act.

Where the question of principle involved had already been made

**RAILWAY—INTERFERENCE WITH CARRIAGE-WAY BY—continued.**

the subject of determination by the High Court of Justiciary in an appeal in a former prosecution, *held* that a Sheriff had rightly refused to sist a prosecution for penalties pending the issue of a declarator raising the same question.—*Glasgow City and District Railway Company v. Meldrum's Trustees*, High Court, 15th July 1884, p. 463.

An Act of Parliament, which empowered a company to make underground railways within a town, and for the purposes of their undertaking to interfere with the streets, enacted that 'in constructing the railways the company shall restore the portions of carriage-way of any street to be from time to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed, and they shall be liable to a penalty not exceeding £20 for every day after the expiration of the said period during which such portions respectively shall not be restored.'—Held that under this enactment the company were liable in the penalty if they did not within three months restore portions of the street used by them for the purposes of their works, although these portions did not include the whole breadth of the carriage-way, but left a sufficient space to allow carriage and cart traffic to pass.—*Glasgow City and District Railway Company v. Hutchison's Trustees*, High Court, 20th March 1884, p. 420.

**RECKLESS FIRE-RAISING.**

See **WILFUL FIRE-RAISING**, p. 287.

**RECORD.**

See **PLEA OF GUILTY UNAUTHENTICATED**, p. 132.

**REFORMATORY SCHOOL.**

See **SENTENCE, SUSPENSION OF PART OF**, p. 454.

**RELEVANCY.**

See **BROKER**, p. 1.

„ **AGGRAVATION**, p. 31.

„ **STATUTE 29TH AND 30TH VIC., c. CCLXXIII.** (*Glasgow Police Act, 1866*), p. 147.

„ **OBSTRUCTION, ANNOYANCE, OR DANGER**, p. 265.

„ **BREACH OF THE PEACE**, p. 278.

„ **FRAUDULENT DEBTOR**, pp. 48 and 293.

„ **PERJURY**, p. 350.

„ **BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY**, p. 443.

„ **WILFUL FIRE-RAISING**, p. 451.

„ **FRAUDULENT BANKRUPT**, p. 473.

„ **THEFT**, p. 552.

„ **CULPABLE HOMICIDE**, p. 694.



## REMIT TO SHERIFF.

Circumstances in which the High Court remitted to the Inferior Court a Case stated on Appeal under The Summary Prosecutions Appeals Act, 1875, for the purpose of receiving additional evidence, and of amending the Case.—*Nelson v. Crockatt*, High Court, 13th Nov. 1884, p. 514.

A, a tailor, sued B in the Small-Debt Court for the price of a suit of clothes. B pleaded that he had not dealt with A, but with C, whose name was on the door of A's shop, that circulars had been issued by C from the shop in his own name, and that he (B) in giving his order to C, had done so to extinguish a counter claim which he had against him. A produced a minute of agreement between himself and C to show that the latter was his shopman, and that he (A) was the principal. The Sheriff decerned against B, who appealed. The Court sustained the appeal, and remitted to the Sheriff for rehearing, and proof, if necessary.—*Bryce v. Spence*, High Court, 10th July 1885, p. 624.

See OPPRESSION, p. 471.

## RESET.

A person convicted upon a criminal libel in the Sheriff Court of Edinburgh, which charged reset of theft in so far as the accused did, 'at some place in the city or county of Edinburgh, to the complainer unknown, wickedly and feloniously receive and reset the watches above libelled, knowing the same to have been stolen'—suspended and pleaded (1), That the libel was irrelevant in respect of insufficient specification of the *locus*, and (2), That as it had been proved that the panel had received the watches in Glasgow, not in Edinburgh, the Sheriff had no jurisdiction.

The Bill refused, and held that reset being a *crimen continuum*, the libel was therefore relevant, and the objection to the jurisdiction bad.—*Gracie v. Stuart*, High Court, 22nd Feb. 1884, p. 379.

## RES JUDICATA.

See THOLING ASSIZE, p. 206.

## RESTRICTING SMALL DEBT CLAIM.

See SMALL DEBT, p. 221.

## REVIEW.

See ALTERNATIVE CHARGE AND GENERAL CONVICTION, p. 312.

„ NUISANCE, SMOKE, p. 509.

———— IN CIVIL CASES.

See JURISDICTION, p. 233.

———— IN EXCHEQUER CASES.

See EXCISE PROSECUTION, p. 354.

**REWARD—ATTEMPT TO EXTORT.**

See **VIOLATING SEPULCHRE**, p. 65.

**RIOTOUS AND DISORDERLY CONDUCT—BY SHOUTING.**

See **STATUTE 29TH AND 30TH VIC., c. CCLXXIII.** (Glasgow Police Act, 1866), p. 147.

**RIVER.**

See **STATUTE 20TH AND 21ST VIC., c. LXXIII.** (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

**ROAD.**

See **LOCOMOTIVES ON TURNPIKES**, p. 186.

**ROAD LOCOMOTIVE.**

The Roads and Bridges (Scotland) Act, 1878, by section 123 incorporated the 107th section of the General Turnpike Act, 1831, which enacts 'that no person shall hereafter erect any' . . . 'steam-engine' . . . 'within the distance of 100 yards from any part of any turnpike road, under the penalty of £5 for every day such' . . . 'steam-engine' . . . 'shall continue, unless the same shall be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise;' . . . 'provided always that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of any' . . . 'steam-engine' . . . 'in any case where by common law the same shall be a public or private nuisance.'—Held that a contravention of the above enactment had been committed by placing and working a steam traction engine, for the purpose of driving a thrashing-mill, within 100 yards of a public road without a sufficient screen.—*M'Leish v. Crichton*, High Court, 14th March 1883, p. 225.

See **LOCOMOTIVES ON TURNPIKES**, p. 186.

„ **STEAM-ENGINE NEAR TURNPIKE ROAD**, p. 225.

**TRUSTEES.**

See **STREETS AND ROADS, OBSTRUCTION OF**, p. 497.

**WITHIN BURGH.**

See **STREETS AND ROADS, OBSTRUCTION OF**, 497.

**ROD—FISHING WITH.**

See **SALMON FISHING**, p. 518.

**ROGUE AND VAGABOND.**

See **BEGGING, FRAUDULENT**, p. 193.

**SALMON FISHING.**

Held that a summary complaint charging a contravention of the Act 7th and 8th Vict., c. 95 (Act for the Preservation of Salmon Fisheries), section 1, in so far as the accused did 'wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take salmon, grilse, &c.,'

SALMON FISHING—*continued*.

was not alternative, and a general conviction following thereon sustained.

Observed that it was extravagant to maintain that a proprietor of fishings prosecuting a poacher on the above complaint, ought to be called upon to produce his title to the fishings.—*O'Neills v. Campbell*, High Court, 18th July 1883, p. 305.

In a prosecution for penalties before a Sheriff, under the Salmon Fisheries Acts, the accused maintained that, as a member of the Royal Burgh of Forres, he had a right to fish for salmon at the place libelled, and produced a royal charter in favour of the Burgh of the water and fishings in Findhorn; with all the fisheries, fishes, mussells, and mussel-scalps, and all the other fishings, possessions, and liberties which of old pertained, or were known to have pertained to the Burgh and community thereof. No evidence of possession on this charter was led, and the Sheriff convicted 'in respect of the evidence adduced,' and imposed a fine of twenty shillings and expenses.

Held, in an appeal to the Circuit Court, that as a question of competing rights had been relevantly raised, the procedure before the Sheriff ought either to have been sisted or the complaint dismissed, leaving parties to their remedy in the appropriate Civil Court, and the conviction therefore recalled.—*Higgins v. The Earl of Moray*, High Court, 9th September 1884, p. 479.

The 21st section of The Salmon Fisheries (Scotland) Act, 1868, which prohibits the having salmon in possession between the commencement of the latest and the termination of earliest annual close time which is in force *for any district*, applies to that period during which all the rivers within the limits of the Act are closed, and no conviction therefore can be obtained under it so long as any of these rivers are open.

Question whether it applies to the period during which net fishing is illegal, but rod fishing is allowed.—*Wilsone v. Harvey and others*, High Court, 13th November 1884, p. 518.

See INSTANCE, p. 622.

---

—————, WITH LEISTER.

Four men were charged with a contravention of section 8 of The Tweed Fisheries Act, 1859, by taking salmon by 'light and leister, or otherwise to the prosecutor unknown,' during the annual close time, but on a day on which fishing by rod and line was legal, and they were convicted of the contravention charged. The conviction quashed, and sentence following thereon suspended, in respect that there was nothing set forth in the complaint to show that the fish might not have been caught in a lawful manner.—*Walker v. Rodger*, High Court, 19th March 1885, p. 595.

**SALMON FISHING, BY STAKE NETS.**

See **STAKE NETS**, p. 608.

**SALMON, POSSESSING DURING CLOSE TIME.**

See **SALMON FISHING**, p. 518.

**SALVATION ARMY.**

A body of persons known as the Salvation Army having been in the habit of walking in procession through the streets of a Burgh in a manner which seemed to the Magistrates annoying to the lieges, and likely to occasion a breach of the peace, the Magistrates issued a proclamation under the Act 1606, c. 17, by which they prohibited all such processions, and gave notice that those taking part in them would render themselves liable to prosecution and penalty. The Salvation Army, in disregard of this proclamation, made a procession through the streets of the Burgh of a noisy and disorderly character, and certain members of it, on being convicted (1) of breach of the peace, and (2) of breaking the terms of the proclamation, appealed.—Held that the question whether the procession and crowd had a tendency to cause and did cause a breach of the peace was a question of fact, a judgment upon which the Magistrate was entitled to reach. Secondly, that the Magistrates were 'entitled to issue, and had in the circumstances very properly issued, the proclamation, breach of which was a municipal offence, and that the appellants having wrongfully disregarded the proclamation, they were rightly convicted of a breach of its terms, and the appeal dismissed accordingly.—*Deakin and others v. Milne*, High Court, October 27, 1882, p. 174.

See **BREACH OF THE PEACE**, p. 278.

**SEAMAN.**

See **SHIP**, p. 367.

**SENTENCE.**

See **INFAMY, DECLARATION OF**, p. 118.

„ **PLEA OF GUILTY, UNAUTHENTICATED**, p. 132.

„ **FRAUDULENT BANKRUPT**, p. 473.

„ **STAKE NETS**, p. 608.

---

**SEPARATING PARTS OF.**

See **INFAMY, DECLARATION OF**, p. 118.

„ **SENTENCE, SUSPENSION OF PARTS OF**, p. 454

---

**FOLLOWING TEN PREVIOUS CONVICTIONS.**

A woman, fifty-seven years of age, pleaded guilty before a Circuit Court to the theft of an article of small value, aggravated by ten previous convictions. She had been sentenced on her sixth conviction in 1873 to eight years' penal servitude, the

**SENTENCE—FOLLOWING TEN PREVIOUS CONVICTIONS—*continued*.**

immediately preceding sentence being for a like period, and between 1882 and 1884 she had been four times convicted in the inferior Courts, and had received sentences of twelve months, twenty-one days, ten days, and thirty days, respectively. The case was certified for sentence, and the High Court, having regard to the fact that the panel had been nearly three months in prison, and without laying down any general principle, pronounced sentence of eight months' imprisonment.—*Mary Ann Watson*, High Court, 19th May 1884, p. 448.

---

**SUSPENSION OF PART OF.**

A boy, fifteen years old, pleaded guilty in a Police Court to assaulting a woman by striking her once on the face to the effusion of blood, and was sentenced to be imprisoned for ten days, and thereafter to be sent to a reformatory school for four years, under the provisions of the Reformatory Schools Act, 1866, sec. 14. He brought a suspension, alleging that he had been hurried off to the Court without notice to his parents, and having been asked to plead while he was without legal advice, had in his confusion pleaded guilty under a misunderstanding as to the nature of the charge. Six previous Police Court convictions of other offences than assault were produced in the High Court.

The Court, following the case of *M'Guire v. Fairbairn*, 9th November 1881, Couper vol. iv., p. 536, in respect of the trifling nature of the offence, and of the want of notice to the boy's parents, *suspended* the conviction, in so far as regarded the order of detention in the reformatory school.—*Farquharson v. Guthrie*, High Court, 15th July 1884, p. 454.

---

**CUMULATIVE.**

See **STAKE NETS**, p. 608.

**SEPARATION OF CHARGES.**

See **MOBBING AND RIOTING**, p. 124.

---

**OF TRIALS.**

See **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM-VESSEL**, p. 680.

**SHERIFF.**

See **CONTEMPT OF COURT**, p. 387.

„ **FUGITIVE**, p. 649.

„ **DECREE IN FORO**, p. 670.

---

**JURISDICTION OF.**

See **INFAMY, DECLARATION OF**, p. 118.

„ **MOBBING AND RIOTING**, p. 124.

**SHERIFF—continued.**

**JURISDICTION OF, UNDER SMALL DEBT ACT.**

See **TRADES UNION, UNREGISTERED**, p. 137.

„ **SMALL DEBT**, p. 221.

———— **RECORDING EVIDENCE BY.**

See **STATUTE 37TH AND 38TH VIC., c. LXIV.** (Evidence Further Amendment (Scotland) Act, 1874), p. 118.

———— **RESPONDENT IN A SUSPENSION.**

See **CONTEMPT OF COURT**, p. 387.

———— **COMPETING CIVIL RIGHTS BEFORE.**

See **SALMON FISHINGS**, p. 479.

**SHIP.**

A seaman charged under the Merchant Shipping Act, 1854, section 243, sub-section 4, with wilful disobedience to the lawful commands of the master *or* the chief engineer of the yacht in which he was employed, was convicted 'of the wilful disobedience charged.'—The conviction suspended as being a general conviction following upon an alternative charge, and in respect it was not distinctly stated either in the complaint or conviction what the orders were which the suspender was said to have disobeyed, and who gave them.—*Reaney v. Maddever*, High Court, 22nd Nov. 1883, p. 367.

**SHORTHAND WRITER'S NOTES.**

See **STATUTE 37TH AND 38TH VIC., c. LXIV.** (Evidence Further Amendment (Scotland) Act, 1874), p. 118.

**SHOUTING.**

See **STATUTE 29TH AND 30TH VIC., c. CCLXXIII.** (Glasgow Police Act, 1866), p. 147.

**SIST.**

See **DECREE IN FORO**, p. 670.

**SMALL DEBT.**

In an action in the Small Debt Court, libelling on an account amounting in full to more than the statutory limit of £12, the conclusion of the summons was restricted, so as to fall within the limit, and after proof the Sheriff disallowed certain items of the original account, and in decerning deducted the sums so disallowed from the original amount of the account, and not from the sum concluded for. Held on appeal that in thus giving decree for the balance proved to be due, which did not exceed the statutory limit, the Sheriff had not exceeded his powers, and the appeal dismissed.—*Dalglish and Kerr v. Anderson*, Glasgow, Feb. 22, 1883, p. 221.

**SMALL DEBT COURT.**

See **SMALL DEBT**, p. 221.

„ **DECREE IS FORBID**, p. 670.

**SMOKE—NUISANCE FROM.**

See **STATUTE 20TH AND 21ST VIC., c. LXXII** (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

**SPECIFICATION—WANT OF.**

See **STATUTE 29TH AND 30TH VIC., c. CCLXXIII** (Glasgow Police Act, 1866), p. 147.

„ **PROSTITUTES, HARBOURING**, p. 165.

„ **FRAUDULENT DEBTOR**, p. 293.

„ **EXCISE PROSECUTION**, p. 354.

„ **CONTEMPT OF COURT**, p. 387.

„ **THEFT**, p. 552.

„ **NEGLECT OF DUTY BY MASTER AND MATE OF STEAM-VESSEL**, p. 680.

„ **CULPABLE HOMICIDE**, p. 694.

**STAKE NETS.**

A had leave from B, a fishery proprietor, to set a stake net in the Solway Firth to catch white fish. It was set for that purpose during the close time for salmon, and one morning early a salmon was found in it by a policeman before A had gone to the net. Held that this did not constitute a 'taking' during close time in the sense of the Salmon Fisheries (Scotland) Act, 1868, inferring a contravention of the Act.

The Justices adjudged the accused to pay five shillings of penalty, with twenty shillings for the salmon found in the prisoner's net of farther penalty, with thirty shillings of expenses, and without any alternative also adjudged the accused to be imprisoned for the space of fourteen days upon a complaint charging a contravention of The Salmon Fisheries (Scotland) Act, 1868, by fishing for salmon by stake nets during close time. Opinion, per Lord Young, that this cumulative form of sentence was illegal and was a sufficient ground of itself for suspension.—*Haydon v. Cormack*, High Court, 19th March 1885, p. 608.

**STATION-MASTER.**

See **CULPABLE HOMICIDE**, p. 259.

**STATUTE.**

1606, c. 17 (Act for Staying Unlawful Conventions within Burgh).

See **SALVATION ARMY**, p. 174.

---

1672, c. 16 (Concerning the Regulation of Judicatories).

See **JURISDICTION**, p. 233.



**STATUTE—continued.**

20TH GEO. II., c. 43 (Heritable Jurisdiction Act).

SEC. 34.

See JURISDICTION, p. 233.

---

13TH GEO. III., c. 31 (Act for the more effectual execution of criminal laws in the two Parts of the United Kingdom).

See RESET, p. 379.

---

54TH GEO. III., c. 67 (For allowing Appeals to the Circuit Court in Civil Causes).

SEC. 5.

See JURISDICTION, p. 233.

---

55TH GEO. III., c. 94 (British White Herring Fishery Act, 1815).

SEC. 12.

See HERRING BARREL, p. 458.

---

5 GEO. IV., c. 83 (Act for the Punishment of Rogues and Vagabonds, 1824).

SECS. 3 and 4.

See BEGGING, FRAUDULENT, p. 193.

---

7TH AND 8TH GEO. IV., c. 53 (Inland Revenue Act, 1823).

SECS. 79, 82, and 84.

See EXCISE PROSECUTION, p. 354.

---

9TH GEO. IV., c. 58 (Home-Drummond Act).

SEC. 21.

See IMPRISONMENT, IMMEDIATE, p. 374.

---

1ST AND 2ND WM. IV., c. 43 (Turnpike Roads (Scotland) Act, 1831).

SECS. 96, 99.

See LOCOMOTIVES ON TURNPIKES, p. 186.

SEC. 123.

See ROAD LOCOMOTIVE, p. 225.

SEC. 96.

See ROADS AND STREETS, OBSTRUCTION OF, p. 497.

---

2ND AND 3RD WM. IV., c. 68 (Day Trespass Act).

See STATUTE 43RD AND 44TH VIC., c. 47 (Ground Game Act), p. 526.

**STATUTE—continued.**

7TH WM. IV. and 1ST VIC., c. 41 (Small Debt Act).

SECS. 2, 30, and 31.

See TRADES UNION, UNREGISTERED, p. 137.

„ SMALL DEBT, p. 221.

„ JURISDICTION, p. 233.

„ REMIT TO SHERIFF, p. 624.

SECS. 15, 16, and 31.

See DECREE IN FORO, p. 670.

7TH AND 8TH VIC., c. 95 (Preservation of Salmon Fisheries Act, 1844).

SEC. 1.

See SALMON FISHING, p. 305.

8TH AND 9TH VIC., c. 33, SEC. 142 (Railway Clauses Consolidation (Scotland) Act, 1845).

SEC. 142.

A private Act of Parliament which empowered a company to construct an underground railway within a city, enacted that the penalty incurred by the company for not restoring within a certain time the carriage-way of streets which they were authorised to interfere with, should be recoverable 'by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored.' The private Act incorporated the Railway Clauses Consolidation (Scotland) Act, 1845.

Held that a proprietor or tenant proceeding for the recovery of these penalties was in the position of an informer for the public interest, and, consequently, that half the penalty was properly apportioned to the poor of the parish under sec. 142 of the Railway Clauses Consolidation Act.—*Glasgow City and District Railway Company v. Meldrum's Trustees*, High Court, 15th July 1884, p. 463.

8TH AND 9TH VIC., c. 41 (Highways and Statute Labour Act, 1845).

SECS. 26 and 38.

See ROADS AND STREETS, OBSTRUCTION OF, p. 497.

16TH AND 17TH VIC., c. 80 (Sheriff Courts Act, 1853).

SEC. 22.

See JURISDICTION, p. 233.

16TH AND 17TH VIC., c. 119 (Betting Act, 1853).

SEC. 3.

See BETTING, p. 703.

**STATUTE—continued.**

17TH AND 18TH VIC., c. 104 (Merchant Shipping Act, 1854).

SEC. 243, SUB-SEC. 4.

See SHIP, p. 367.

19TH AND 20TH VIC., c. 56 (Constituting the Court of Session the Court of Exchequer).

SEC. 17.

See EXCISE PROSECUTION, p. 354.

19TH AND 20TH VIC., c. 79, SEC. 81 (Bankruptcy (Scotland) Act, 1856).

See BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY, p. 443.

20TH AND 21ST VIC., c. 73 (Smoke Nuisance (Scotland) Abatement Act, 1857).

SECS. 1 and 14.

The Smoke Nuisance (Scotland) Abatement Act, 1857, imposes certain penalties on the use of furnaces not constructed to consume their own smoke, 'employed in the working of engines by steam, whether locomotive or otherwise, in any place to which this Act shall apply, or on board of any steam-vessel stopping at or in any such place, or in or at any port, pier, landing place, or harbour within the same, or when plying upon any part of a river which, at such part, shall not exceed a quarter of a mile in breadth,' or on the negligent use of such furnaces when properly constructed. The 14th section of the same Act, with reference to Royal Burghs, declares that the word 'place' shall include the whole area contained within the parliamentary or police limits of the Burgh, and the 'Smoke Nuisance (Scotland) Acts Amendment Act, 1865,' extends this definition to other Burghs. Held that an offence, under the Act of 1857, could not be committed on board a vessel sailing in a part of a river more than a quarter of a mile broad, although within the parliamentary or police limits of a Burgh to which the Act applied.—*Campbell v. Auld*, High Court, October 27, 1882, p. 152.

SECS. 1, 2, 6, 7, and 9.

See NUISANCE SMOKE, p. 509.

20TH AND 21ST VIC., c. CXLVIII. (Tweed Fisheries Act, 1857).

SEC. 96.

See SUSPENSION, COMPETENCY OF, p. 595.

**STATUTE—continued.**

**22ND AND 23RD VIC., c. LXX. (Tweed Fisheries Act, 1859).**

**SEC. 8.**

See **SUSPENSION, COMPETENCY OF**, p. 595.

---

**24TH AND 25TH VIC., c. 70 (Locomotives Act, 1861).**

**SEC. 12.**

See **LOCOMOTIVES ON TURNPIKES**, p. 186.

---

**25TH AND 26TH VIC., c. 35 (Public Houses Acts Amendment (Scotland) Act, 1862).**

**SCHEDULE A, CERTIFICATE, No. 3.**

See **TRAFFICKING IN SPIRITS**, p. 33.

„ **BREACH OF CERTIFICATE**, p. 616.

**SCHEDULE A, CERTIFICATE No. 1.**

See **HOTEL, KEEPING OPEN**, pp. 150 and 215.

**SEC. 2.**

See **BREACH OF CERTIFICATE**, p. 535.

„ **BREACH OF CERTIFICATE BY SERVANT**, p. 602.

---

**25TH AND 26TH VIC., c. 63 (Merchant Shipping Act, 1862).**

See **SHIP**, p. 367.

---

**25TH AND 26TH VIC., c. 101 (General Police and Improvement (Scotland) Act, 1862).**

**SEC. 309.**

See **OMNIBUSES, STARTING OF**, p. 17.

**SEC. 251.**

See **OBSTRUCTING STREET**, pp. 19, 212, and 265.

„ **OBSTRUCTION, ANNOYANCE, OR DANGER**, p. 265.

„ **STREETS AND ROADS, OBSTRUCTION OF**, p. 497.

**SEC. 430.**

See **CONVICTION FOLLOWING PARTLY UPON CONFESSION**, p. 169.

---

**27TH AND 28TH VIC., c. 53 (Summary Procedure Act, 1857).**

See **MOBBING AND RIOTING**, p. 124.

**SECS. 14 and 34.**

See **PLEA OF GUILTY, UNAUTHENTICATED**, p. 132.

„ **CONVICTION FOLLOWING PARTLY UPON CONFESSION**, p. 169.

„ **SUMMARY PROCEDURE ACT.**

**SEC. 5.**

See **DEFORCEMENT**, p. 582.

**SECS. 6 and 11.**

See **ADJOURNMENT OF DIET**, p. 631.

---

**27TH AND 28TH VIC., c. CXXXIX. (Zetland Road Act, 1864).**

See **STREETS AND ROADS, OBSTRUCTION OF**, p. 497.

**STATUTE—continued.**

28TH AND 29TH VIC., c. 83 (Locomotives Act, 1865).

SECS. 2 and 3.

See LOCOMOTIVES ON TURNPIKES, p. 186.

SEC. 6.

See STEAM-ENGINE NEAR TURNPIKE ROAD, p. 225.

„ ROAD LOCOMOTIVE, p. 225.

28TH AND 29TH VIC., c. 102 (Smoke Nuisance (Scotland) Acts Amendment Act, 1865).

SEC. 1.

See STATUTE 20TH AND 21ST VIC., c. 73 (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

29TH AND 30TH VIC., c. 117 (Reformatory Schools Act, 1866).

SEC. 14.

See SENTENCE, SUSPENSION OF PART OF, p. 454.

29TH AND 30TH VIC. c., 118 (Industrial Schools Act, 1866).

SECS. 14 and 38.

See INDUSTRIAL SCHOOLS, DETENTION IN, p. 638.

29TH AND 30TH VIC., c. CCLXXIII. (Glasgow Police Act, 1866).

SEC. 135, SUB-SEC. 5.

The Glasgow Police Act, 1866, section 135, sub-section 5, imposes a penalty upon 'every person who is riotous, disorderly, or indecent in his behaviour.' A conviction and sentence pronounced in the Glasgow Police Court upon a complaint which charged a contravention of this section, in so far as the respondent, of the date and at the place libelled, was 'riotous and disorderly in his behaviour, by shouting aloud, by all which, or part thereof, a noise and disturbance was created, and a large crowd assembled, and the lieges were annoyed,' suspended in respect that from want of specification of the circumstances in the complaint there was not set forth an offence under the Statute.—*Ritchie v. M'Phee*, High Court, Oct. 25, 1882, p. 147.

SECS. 136, 137, and 142.

See PROSTITUTES, HARBOURING, p. 165.

SECS. 172, 184, and 200.

See BROKER, p. 1.

SECS. 131 and 132.

See ALTERNATIVE CHARGE AND GENERAL CONVICTION, p. 312.

**STATUTE—continued.**

**30TH AND 31ST VIC., c. 96** (Certain Debts Recovery Act, 1867).

**SECS. 10, 14, and 17.**

See **JURISDICTION**, p. 233.

---

**30TH AND 31ST VIC., c. 101** (Public Health (Scotland) Act, 1867.)

**SECS. 18, 22, and 103-8.**

See **STATUTE 38TH AND 39TH VIC., c. 62, SECS. 2 and 3** (Summary Prosecutions Appeals Act, 1875), p. 329.

---

**31ST AND 32ND VIC., c. 123** (Salmon Fisheries (Scotland) Act, 1868.)

**SEC. 21.**

See **SALMON FISHING**, p. 518.

**SECS. 9 and 15.**

See **STAKE NETS**, p. 608.

**SEC. 130.**

See **INSTANCE**, p. 622.

---

**34TH AND 35TH VIC., c. 33** (Summary Jurisdiction (Scotland) Act, 1881).

See **MOBBING AND RIOTING**, p. 124.

---

**34TH AND 35TH VIC., c. 41** (Trades Union Act).

**SEC. 31.**

See **TRADES UNION, UNREGISTERED**, p. 137.

---

**34TH AND 35TH VIC., c. 112** (Prevention of Crimes Act, 1871).

**SEC. 15.**

See **BEGGING, FRAUDULENT**, p. 193.

---

**35TH AND 36TH VIC., c. 62** (Education (Scotland) Act, 1872).

**SECS 70 AND 71.**

See **EDUCATION ACT**, p. 614.

---

**35TH AND 36TH VIC., c. 93** (Pawnbrokers Act, 1872).

**SECS. 5, 6, 37, 52, and 56.**

See **EXCISE PROSECUTION**, p. 854.

---

**37TH VIC., c. 15** (The Betting Act, 1874).

See **BETTING**, p. 703.

---

**37TH AND 38TH VIC., c. 64** (Evidence Further Amendment (Scotland) Act, 1874).

**SEC. 4.**

A criminal libel before a Sheriff and a Jury which charged the crime of perjury committed in a civil action before a Sheriff did not set forth the *ipsissima verba* of the deposition upon

**STATUTE—continued.**

which the charge was founded, but the tenor thereof according to the shorthand writer's notes ; and it appeared from the evidence adduced at the trial that the Sheriff in the civil action had not himself 'dictated to the shorthand writer the evidence he was to record,' as directed by the 'Evidence Further Amendment (Scotland) Act, 1874,' but that the deposition had been taken down in presence of the Sheriff in the manner which is in use in the Court of Session. It was objected in a suspension that the *ipsissima verba* of the deposition on oath not being set forth in the libel, the latter was irrelevant ; and that as the deposition had not been taken down in the manner required by section 4 of the 'Evidence Further Amendment (Scotland) Act, 1874,' there was no proper record thereof, and no legal foundation for the charge. Held that no substantial irregularity having been committed in the proceedings, suspension of the conviction ought to be refused.

Observations on the mode of recording evidence in civil cases in Sheriff Courts.—*Roberts v. Henderson*, High Court, October 25, 1882, p. 118.

---

38TH VIC., c. 17 (Explosives Act, 1875).

SECS. 23 and 39.

See EXPLOSIVES—KEEPING, p. 539.

---

38TH AND 39TH VIC., c. 62 (Summary Prosecutions Appeals Act, 1875).

SECS. 2 and 3.

The Summary Prosecutions Appeals Acts, 1875, sec. 3, enacts that a party desirous of having a Case stated for the opinion of the superior Court shall not be entitled to have such a Case stated unless, within three days after the determination of the inferior Judge, he shall lodge in the hands of the clerk of the inferior Court a bond of caution to answer and abide the judgment of the superior Court, and to pay the costs awarded by that Court, or, in the discretion of the inferior Judge, consign in the hands of the clerk such sum as the inferior Judge may fix to meet the penalty and the costs of the superior Court.

Held that when one of the three days after the determination of the inferior Judge is a Sunday, it is not to be treated as a *dies non*, but is to be counted, unless it is the last of the three days ; and consequently, that an appellant who had been convicted on a Saturday, but did not offer to consign until the following Wednesday, was not entitled to have a Case



**STATUTE—continued**

stated.—*Hutton v. Garland*, High Court, 13th June, 1883, p. 274.

A Local Authority petitioned a Sheriff under The Public Health Act, 1867, to have the proprietor of certain houses ordered to remedy a nuisance alleged to exist. The Sheriff granted decree, finding that the nuisance existed, and ordering the defender to execute certain remedial alterations within a certain time, 'under certification that if the said decree be not complied with within the time appointed, the defender should be liable in the penalties enumerated in section 20 of the Act 30 and 31 Vic., c. 101; finds the defender liable in expenses,' &c. The defender took a Case under The Summary Prosecution Appeals Act, 1875.

The Local Authority objected to the competency, on the ground that appeal which was excluded by section 108 of the Public Health Act, 1867, had not been made competent under The Summary Prosecutions Appeals Act, 1875, inasmuch as the case was not a 'cause' within the meaning of section 2 of that Act, and that if it was, it had not been 'determined' by the Sheriff in the sense of section 3, expenses not being a penalty, and no other penalty having been imposed.

Held that the appeal was incompetent, on the ground that if the petition was a cause within the meaning of section 2, it had not been finally determined in the sense of section 3 by the imposition of a penalty.

Opinions as to whether the penalties provided by section 20 of The Public Health Act, 1867, were penalties in the sense of section 2 of The Summary Prosecutions Appeals Act, and whether, if they were, they could be recovered in a petition which did not specifically pray the Sheriff for their imposition.—*Lee v. Local Authority of Lasswade*, High Court, 2nd Nov. 1883, p. 329.

See WEIGHTS AND MEASURES, p. 243.

„ See EXCISE PROSECUTION, p. 354.

„ APPEAL, p. 420.

38TH AND 39TH VIC., c. LXIII. (Sale of Food and Drugs Act, 1875).  
SEC. 22.

See ADULTERATION OF MILK, p. 409.

40TH AND 41ST VIC., c. CXCIII. (Greenock Police Act, 1877).  
SEC. 250.

See STATUTE 20TH AND 21ST VIC., c. LXXIII. (Smoke Nuisance (Scotland) Abatement Act, 1857), p. 152.

STATUTE—*continued.*

41ST AND 42ND VIC., c. 49 (Weights and Measures Act, 1878).

SECS. 19, 22, 24, 29, and 73.

See WEIGHTS AND MEASURES, p. 243.

---

41ST AND 42ND VIC., c. 51 (Roads and Bridges (Scotland) Act, 1878).

SECS. 122, 123, and 124.

See LOCOMOTIVES ON TURNPIKES, p. 186.

„ ROAD LOCOMOTIVE, p. 225.

„ STREETS AND ROADS, OBSTRUCTION OF, p. 497.

---

41ST AND 42ND VIC., c. 58 (Locomotives Amendment (Scotland) Act, 1878).

SEC. 4.

See LOCOMOTIVES ON TURNPIKES, p. 186.

---

41ST AND 42ND VIC., c. 74 (Contagious Diseases (Animals) Act 1878).

SECS. 31, 61, and 64.

See CONTAGIOUS DISEASES, ANIMALS, p. 267.

---

42ND AND 43RD VIC., c. CXXXII. (Edinburgh Municipal and Police Act, 1879).

SECS. 99, 153, and 309.

Two persons convicted of a contravention of the bye-law authorised by The Edinburgh Municipal and Police Act, 1879, which prohibits the throwing or scattering any sand or rubbish on any street, &c., objected in a Bill of Suspension, that the bye-law not being made in accordance with the provisions of the Statute, the conviction was without statutory warrant, and illegal, the objection repelled, the proceedings found orderly proceeded with, and the Bill refused. Held also that the suspenders could not be heard to plead that they had acted under the instructions of the Edinburgh Tramway Company, in whose employment they were, in respect that the fact was not before the Court.—*Glass and Dempster v. Linton*, High Court, 27th October 1882, p. 160.

SECS. 258 and 259.

See PROSTITUTES, HARBOURING OF, p. 210.

SEC. 287.

See PUBLIC ENTERTAINMENT, p. 303.

---

43RD AND 44TH VIC., c. 34 (Debtors (Scotland) Act, 1880).

SEC. 13, SUB-SECS. 1-5, (A) 1, (A) 2, (A) 5, (B) 3.

See FRAUDULENT DEBTOR, pp. 48 and 293.

**STATUTE—continued.**

See **BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY**,  
p. 443.

„ **FRAUDULENT BANKRUPT**, pp. 473 and 665.

---

**43RD AND 44TH VIC., c. 47 (Ground Game Act).****SEC 1.**

A person who had been invited by letter by a farmer to stay with him for a week and shoot rabbits, was charged with an offence under the Day Poaching Act, as having been upon the lands of the farm without leave from the proprietor, in pursuit of game. The complaint did not set forth anything as to the terms of the lease, nor was it put in evidence, and the accused was acquitted by the Sheriff. An appeal from his judgment was *dismissed*, the Lord Justice-Clerk and Lord Young being of opinion that the accused was duly authorised at common law to kill rabbits, and was also a person who might be authorised, and had been duly authorised, by the tenant under the provisions of the Ground Game Act to kill rabbits, Lord Craighill concurring, but solely on the ground that there was nothing in the complaint or the evidence to indicate that the tenant's common law right to kill rabbits himself or allow others to do so had been excluded by the lease.—*Stuart v. Murray*, High Court, 13th November 1884, p. 526.

---

**44TH AND 45TH VIC., c. 33 (Summary Jurisdiction (Scotland) Act, 1881).****SECS. 6 and 11.**

See **EXCISE PROSECUTION**, p. 354.

„ **APPEAL**, p. 420.

„ **EXPLOSIVES KEEPING**, p. 539.

See **EDUCATION ACTS**, p. 614.

---

**44TH AND 45TH VIC., c. 69 (Fugitive Offenders Act, 1881).****SEC. 2, SUB-SECS. 3, 5, and 6.**

See **FUGITIVE**, p. 649.

---

**45TH AND 46TH VIC., c. cccxvi. (The Glasgow City and District Railway Act, 1882).****SECS. 34, 37, and 39.**

See **RAILWAY**, p. 420.

„ **RAILWAY, INTERFERENCE WITH CARRIAGE-WAY BY**, p. 463.

**STATUTE—continued.**

46TH AND 47TH VIC., c. 22 (Sea Fisheries Act, 1883).

SEC. 11.

See INSTANCE, p. 628.

46TH AND 47TH VIC., c. 56 (Education (Scotland) Act, 1883).

SECS. 9 and 14.

See EDUCATION ACTS, p. 614.

48TH AND 49TH VIC., c. 69 (Criminal Law Amendment Act, 1885).

SECS. 5 and 9.

Held that the words, 'unlawfully and carnally knows,' in the 5th section of the Criminal Law Amendment Act, are equivalent to, has illicit intercourse with, and therefore that knowledge of a girl above thirteen and under sixteen years of age, by anyone who is not her husband, is unlawful carnal knowledge of her in the sense of said section.

Held that a Jury may, by virtue of the provisions of the 9th section of the Criminal Law Amendment Act, 1885, convict a panel of an offence under the 5th section of that statute, notwithstanding that the indictment does not set forth that statute.—*Henry Watson*, High Court, 15th Dec. 1886, p. 696.

See UNLAWFUL CARNAL KNOWLEDGE, ATTEMPTING TO HAVE, p. 722.

**STEAM-ENGINE NEAR TURNPIKE ROAD.**

The Roads and Bridges Act of 1878, by section 123 incorporated the 107th section of The General Turnpike Act, 1831, which enacts 'that no person shall hereafter erect any' . . . 'steam-engine' . . . 'within the distance of 100 yards from any part of any turnpike road, under the penalty of £5 for every day such' . . . 'steam-engine' . . . 'shall continue, unless the same shall be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise;' . . . 'provided always that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of any' . . . 'steam-engine' . . . 'in any case where by common law the same shall be a public or private nuisance.'—Held that a contravention of the above enactment had been committed by placing and working a steam traction engine, for the purpose of driving a thrashing mill, within 100 yards of a public road without a sufficient screen.—*M'Leish v. Crighton*, High Court, March 14, 1883, p. 225.

**STEAM TRACTION-ENGINE.**

See LOCOMOTIVE ON TURNPIKE, p. 186.

„ ROAD LOCOMOTIVE, p. 225.

**STEAM VESSEL—RUNNING DOWN BOAT.**

See **NEGLECT OF DUTY, CULPABLE AND RECKLESS**, pp. 483 and 680.

**STREET.**

See **OBSTRUCTING STREET**, pp. 19 and 212.

„ **RAILWAY, INTERFERING WITH CARRIAGE-WAY BY**, p. 142.

„ **OBSTRUCTION, ANNOYANCE, OR DANGER**, p. 265.

„ **STATUTE 8TH AND 9TH VIC., c. 33, sec. 142**, p. 463.

**SCATTERING SAND ON.**

See **STATUTE 42ND AND 43RD VIC., c. CXXXII** (Edinburgh Municipal and Police Act, 1879), p. 160.

**INTERFERING WITH TRAFFIC OF.**

See **RAILWAY**, p. 420.

**STREETS AND ROADS—OBSTRUCTION OF.**

Part of a road belonging to a county road trust, constituted under a local Act of Parliament, lay within a burgh which had adopted the General Police Act of 1862. Under the County Road Act the Procurator-fiscal of the county had authority to prosecute offenders against its provisions.—Held that the adoption of the General Police Act gave the Commissioners of Police a concurrent jurisdiction over the road for the purposes of that Act, but did not exclude the jurisdiction of the County Road Trustees, nor derogate from the title of the Procurator-fiscal of the county to prosecute offenders against the provisions of the County Road Act.

The General Turnpike Act of 1831 and the Highways Act of 1845 impose penalties on any person who ‘shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon’ a turnpike road, ‘or on the side or sides thereof, or the footpath or causeways adjoining.’ In a complaint brought under a local Road Act which incorporated this provision, two persons were charged with a contravention of it in so far as they, on a day named, placed two boxes on the public road opposite their shop. The evidence shewed that the boxes could not cause any obstruction, and the Sheriff found that no obstruction was proved, but convicted the accused on the ground that the offence consisted in laying anything upon the road.

Held that the essence of the offence was to lay anything on the road which was of such a nature or so placed as to obstruct it, and that in the absence of any proof of the possibility of such obstruction the conviction was bad.

Question, whether the complaint was relevant unless it set forth that the thing laid on the road was of such a nature or so placed as to cause obstruction.

**STREETS AND ROADS—OBSTRUCTION OF—*continued*.**

Opinion *per* Lord Young that it was not; *contra per* Lord Craighill.—*Leisk & Sandison v. Galloway*, High Court, 12th Nov. 1884, p. 497.

See OBSTRUCTING STREET, p. 19.

**SUMMARY APPLICATION.**

See APPEAL, p. 420.

**SUMMARY JURISDICTION.**

See MOBING AND RIOTING, p. 124.

„ APPEAL, p. 420.

---

Acts, 1864 and 1881.

See DEFORCEMENT, p. 582.

---

Act, 1881.

SEC. 9.

See EDUCATION ACTS, p. 614.

**SUMMARY PROCEDURE.**

See STATUTE 27TH AND 28TH VIC., c. 53, and STATUTE 44TH AND 45TH VIC., c. 33 (The Summary Jurisdiction (Scotland) Acts, 1864 and 1881), pp. 124 and 169.

„ DEFORCEMENT, p. 582.

**SUMMARY PROCEDURE ACT, 1864.**

See SUSPENSION, COMPETENCY OF, p. 595.

SECS. 3 and 28.

See STATUTE 38TH AND 39TH VIC., c. 62, SECS. 2 and 3 (Summary Prosecutions Appeals Act, 1875), p. 329.

See APPEAL, p. 420.

SECS. 4 and 25, Sched. K.

See EXCISE PROSECUTION, p. 354.

SECS. 6 and 11.

See ADJOURNMENT OF DIET, p. 631.

SEC. 34.

See CONVICTION, DEFECT IN, p. 365.

**SUNDAY.**

See STATUTE 38TH AND 39TH VIC., c. 62, SEC. 3 (Summary Prosecutions Appeals Act, 1875), p. 274.

---

**DESECRATION.**

See MOBING AND RIOTING, p. 317.

---

**RAILWAY TRAFFIC.**

See MOBING AND RIOTING, p. 317.

**SUSPENSION—COMPETENCY OF.**

Held that notwithstanding the terms of the 96th section of The Tweed Fisheries Act, 1857, which is incorporated in The Tweed Fisheries Act, 1859, prohibiting a review of a conviction pronounced by any Sheriff under the provisions of the latter Act, except by appeal to the next Circuit Court, a suspension before the High Court was competent of a conviction

SUSPENSION—COMPETENCY OF—*continued.*

of the offence charged pronounced upon a complaint which charged a contravention of the 8th section of the Act of 1859, but which did not set forth facts which necessarily implied a contravention of that Act.—*Walker and Hodger*, High Court, 19th March 1885, p. 595.

See INFAMY, DECLARATION OF, p. 118.

„ STATUTE 29TH AND 30TH VIC., c. cclxxiii. (Glasgow Police Act, 1866), p. 147.

„ STATUTE 42ND AND 43RD VIC., c. cxxxii. (Edinburgh Municipal and Police Act, 1879), p. 160.

„ CONVICTION FOLLOWING PARTLY UPON CONFESSION, p. 169.

„ PERJURY, p. 350.

„ EXCISE PROSECUTION, p. 354.

„ PROOF, REMIT TO SHERIFF TO ALLOW FURTHER, p. 471.

„ SMOKE NUISANCE, p. 509.

## TENANT.

See CONTAGIOUS DISEASES, ANIMALS, p. 267.

## THEFT.

An indictment bore that ‘you,’ the panel, ‘having received’ certain moneys ‘as factor and on behalf of’ the executrix of a deceased bankrupt, ‘and under the trust and duty that you should forthwith hand over the same to’ the trustee on the bankrupt’s sequestrated estate, ‘for the purpose of the same being divided among the creditors of the said estate, and that you should in no event appropriate the same to your own uses and purposes,’ did steal the sum so received.

Held that as the possession set forth was lawful possession, with merely liability to account, there was no relevant charge of theft.

An indictment bore that the panel having acted as subfactor for an heritable securities association from March 1882 to July 1883, and having at various dates in the course of that period received from tenants of the association, who were named, ‘sums of money amounting to £864, 10s. 5d. sterling, and various other sums, being rents and feu-duties of the’ properties belonging to the association, ‘accruing and paid during the period’: and further it being the panel’s duty to account for these rents and feu-duties, and in no event to appropriate them or any part of them to his own uses and purposes, did ‘on several or one or more occasions during the period’ specified, steal the sum mentioned, or otherwise did embezzle it.

Held that the charges of theft and embezzlement were both bad for want of specification, and that the charge of theft was also irrelevant, as the possession set forth was lawful possession, with merely a liability to account.



**THEFT**—*continued*.

The *modus* of a charge of theft, or alternatively of embezzlement, was libelled as consisting of the following facts, viz. :—That the panel, who was unable to pay his debts, and had granted a trust deed for behoof of his creditors in 1879, which was superseded by sequestration of his estates in 1883, promoted a banking company with a capital of £10,000,000, which was registered under the Companies Acts in January in 1881; that he then, without finding caution for his intromissions and the faithful discharge of his office, in terms of the articles of association, entered upon office and acted as general manager of the company until its liquidation in July 1884. Further, that he in the course of carrying on this business got into his custody and control ‘all the moneys of the said company, being the capital of the said company in so far as paid up, and the moneys lodged with the said company by depositors,’ amounting in all to £5000. His duty to apply that money for the best interest and security of the said company, and in no event to appropriate it to his own use, was set forth. The first charge concluded thus—You, the panel, ‘taking advantage of your position as general manager foresaid, and having no directors of the said company duly appointed to control or supervise, you did at various times between’ 19th January 1882 and 1st September 1884, at the premises of the company, steal the sum of £2736. The alternate charge proceeded on the same narrative, and was that you, the panel, did, ‘contrary to your duty and in breach of your trust as general manager foresaid, and out of the ordinary course of banking business, take to yourself out of the moneys in your custody and control as general manager foresaid, unsecured and improper overdrafts on your accounts current with the said company, numbered respectively 1, 4, 5, and 7, the said overdrafts amounting together’ to the sum of £2736, and did thus embezzle that sum.

Held that there was no relevant charge either of theft or embezzlement.

Held, upon an objection to a charge of breach of trust and embezzlement, that the charge sufficiently specified the person to whom the panel was bound to account; also that the *locus* of appropriation contained a sufficient specification of the place where the panel received the money alleged to have been embezzled.

Held in a trial for Breach of Trust and Embezzlement, that it was incompetent to adduce, in support of the charge, evidence of what the panel deponed to in his deposition in a sequestration of the estate, a portion of which he was charged with

THEFT—*continued*.

having embezzled.—*Alexander Gilruth Fleming*, High Court, 23rd March 1885, p. 552.

See BREACH OF TRUST AND EMBEZZLEMENT, p. 492.

## ——— OF GOODS OBTAINED ON APPROBATION.

See FRAUDULENT DEBTOR, p. 48.

## THOLING ASSIZE.

Held by Lord Young (following the case of *Isabella Cobb*, High Court, Swint., Vol. I., pp. 176, 227, and 354) that a person convicted of assault may subsequently be tried for murder on the supervening death of the person injured by the assault.—*Patrick O'Connor*, Glasgow, December 27, 1882, p. 206.

## TIME.

See BAIL, p. 346.

„ BANKRUPT, FRAUDULENT CONCEALMENT OF PROPERTY BY, p. 443.

## TITLE TO SUE.

See PROCURATOR-FISCAL, p. 284.

„ RAILWAY, INTERFERENCE WITH CARRIAGE-WAY BY, p. 463.

„ STATUTE 8TH AND 9TH VIC., c. 33, SEC. 142 (Railway Clauses Consolidation (Scotland) Act, 1845), p. 463.

## TITLES—PRODUCTION OF.

See SALMON FISHING, p. 305.

## TRADE—RESTRAINT OF.

See TRADES UNION, UNREGISTERED, p. 137.

## TRADES UNION—UNREGISTERED.

The widow of a member of a trade society raised a small-debt action against the society for payment of £12, as the funeral allowance due to her as widow. The society pleaded that the Sheriff had no jurisdiction, in respect that the society was an unregistered trades union, some of the purposes of which were in restraint of trade; and that the action, as being an action to enforce an agreement to provide benefits to the members of the society out of its funds, was incompetent at common law, also under section 4 of The Trades Union Act, 1871, which enacts that ‘nothing in this Act shall enable any Court to entertain legal proceedings instituted with the object of directly enforcing,’ ‘any agreement for the application of the funds of a trades union (a) to provide benefits to members.’ The Sheriff granted decree against the defenders, who appealed to the Court of Justiciary under the 31st section of The Small Debt Act, 1837. The respondent objected to the competency of the appeal. The society replied that, as the Sheriff had erroneously sustained his own jurisdiction, and determined the merits of an action which was competent in no Court, an appeal against the decree was competent.

TRADES UNION—UNREGISTERED—*continued.*

Held that the question whether, under the Acts of Parliament and the rules of the society, a contract enforceable in a Court of law had been entered into between the deceased member and the society, was a question which the Sheriff was entitled to determine, and that his judgment finding that there was such a contract was not appealable under the Small Debt Act.

In an appeal to the Court of Justiciary under the 31st section of The Small Debt Act, 1837, which raised an ordinary question of civil liability between private persons, the Court, instead of following the usual practice of modifying the expenses of the successful party at a fixed sum, remitted the account of expenses to the Clerk of Court to tax and report, and thereafter approved of the report, and decerned for the amount as taxed.—*Allison v. Balmain*, High Court, 26th October 1882, p. 137.

## TRAFFICKING IN SPIRITS.

A grocer, licensed to sell exciseable liquors not to be consumed on the premises, in terms of The Public Houses Acts Amendment (Scotland) Act, 1862, Certificate No. 3, Schedule A, having been convicted of permitting or suffering drink to be consumed on his premises, upon a complaint which charged the selling or supplying a gill of whisky, and the permitting the same to be drunk on his premises, the Court, on appeal, quashed the conviction, on the ground that the offence consisted in the trafficking in or giving exciseable liquor for the purpose of being consumed there, and that the permitting by a grocer of a customer to test whisky on his premises while the purchase of a gallon was being made did not amount to a breach of the certificate.—*Lennox v. Ferguson*, High Court, 9th June 1882, p. 33.

---

BY SERVANT AGAINST MASTER'S ORDER.

See BREACH OF CERTIFICATE BY SERVANT, p. 602.

## TRAMWAY.

See STATUTE 42ND AND 43RD VIC., c. CXXXII. (Edinburgh Municipal and Police Act, 1879), p. 160.

## TUTORING WITNESS.

A hotel-keeper, convicted of a contravention of his certificate, brought a suspension on the ground that the evidence upon which the conviction had proceeded was incompetent, averring that of three police-constables, who were the only witnesses for the prosecution, the first examined had communicated to the second, when about to be examined, the questions which had been asked and the answers which had been given in cross-examination; that the second constable had made a

TUTORING WITNESS—*continued*.

similar communication to the third; that these communications were made for the direction and guidance of the witnesses to whom they had been made; and that the evidence given by these witnesses was false. The Court being of opinion that these averments were irrelevant, *refused* the suspension.—

*Campbell v. Cadenhead*, High Court, 15th July 1884, p. 468.

## UNLAWFUL CARNAL KNOWLEDGE.

See STATUTE 48TH AND 49TH VIC., c. 69, SECS. 5 AND 9  
(Criminal Law Amendment Act, 1885), p. 696.

## ATTEMPTING TO HAVE.

An indictment which charged, *inter alia*, the statutory offence set forth in sub-section 1 of section 5 of The Criminal Law Amendment Act, of attempting to have unlawful carnal knowledge of a girl above thirteen and under sixteen, was objected to on the ground that it contained no specification in the minor of the manner in which the alleged attempt had been made, except by the use of the words in the statute, 'did attempt to have unlawful carnal knowledge of' the girl. Objection sustained, and the libel found to be not relevant.—*H. M. Advocate v. Charles Kelly*, Glasgow, 24th December 1885, p. 722.

See STATUTE 48TH AND 49TH VIC., c. 69 (Criminal Law Amendment Act, 1885), p. 696.

USING ~~AND~~ UTTERING FALSE REPORTS AND BALANCE SHEETS.

See BANK DIRECTOR, FRAUDULENT, p. 37.

## VIOLATING SEPULCHRE.

Circumstances in which a person was convicted of 'violating the sepulchres of the dead, and raising and carrying away dead bodies out of their graves,' by abstracting a body from the vault of a mortuary chapel, and concealing it in the hope of extorting money, and sentence of five years' penal servitude was pronounced.—*Charles Soutar*, High Court, October 23 and 24, 1882, p. 65.

## WARRANT—ENDORSED BY SECRETARY OF STATE.

See FUGITIVE, p. 649.

## WEIGHTS AND MEASURES.

The 73rd section of the Weights and Measures Act of 1878 enacts that 'an appeal against a conviction under this Act in Scotland shall be to the Court of Justiciary at the next Circuit Court, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, and not otherwise, and such appeal shall be made under the rules, limitations, and conditions' of the Act abolishing heritable jurisdictions.—Held that this enactment could not be read as excluding appeals on questions of law, under the 3rd section of the

**WEIGHTS AND MEASURES—continued.**

Summary Prosecutions Appeals Act of 1875, for the opinion of the High Court.

A licensed spirit-dealer was in the habit of using glass vessels of three sizes, none of them imperial measures, or represented to be such, in supplying threepence worth, sixpence worth, or one shilling's worth of whisky, as the case might be, when a demand in that way was made by customers. No other quantity, such as twopence worth or fivepence worth, was supplied to customers in these vessels.—Held that this was not a sale by measure within the sense of The Weights and Measures Act, 1878, and a conviction under the 29th section of that Act *quashed*.—*Craig v. M'Phee*, High Court, 14th March 1883, p. 243.

See STATUTE 38TH AND 39TH VIC., c. 62 (Summary Prosecutions Appeals Act, 1875), p. 243.

**WHITE FISHING.**

See STAKE NETS, p. 608.

**WILFUL DISOBEDIENCE.**

See SHIP, p. 367.

**WILFUL FIRE-RAISING.**

Direction by Lord Young, in charging a jury:—‘If a person intentionally, and not in pursuit of any lawful object, sets fire to premises, he commits the crime of wilful fire-raising; and if, while engaged in some other unlawful act, or while in such a state of excitement as not to care what he is doing, he, without deliberate intention to do so, sets premises on fire, he commits the crime of wicked, culpable, and reckless fire-raising; but the accidental setting on fire of premises by mere carelessness is not in ordinary circumstances criminal.

Evidence on which, under the above direction, the Jury found a charge of wilful fire-raising, or otherwise of wicked, culpable, and reckless fire-raising, against a panel, *not proven*.—*Robert Smellie*, Glasgow, 20th June 1883, p. 287.

The major proposition of an indictment charged wilful fire-raising, as also attempt to commit wilful-raising without mention of any aggravation; and the minor narrated that the panel had formed a fraudulent scheme to defraud an Insurance Company, and averred that the crimes were committed in pursuance of said scheme.—Objection to the relevancy that the minor proposition was not covered by the charge in the major repelled.—*Robert Neilson*, Glasgow, 17th June 1884, p. 451.

**WITNESS.**

See THEFT, p. 552.

**WITNESS—EVIDENCE AS TO CHARACTER OF.**

See **CHARACTER OF WITNESS**, p. 379.

————— **NOT ON LIST.**

During a criminal trial in a Sheriff Court, before a Jury, after proof on both sides was declared closed, a person whose name was not on either list of witnesses was examined on oath *in causa* at the request of the Court and the Jury, without any objection being taken by the prisoners, who were convicted.

Held that the examination of such witnesses was incompetent, and the conviction suspended.—*Wynn and another v. Lindsay*, High Court, 22nd November 1883, p. 370.

See **DEFORCEMENT**, p. 582.

————— **RECORDING EVIDENCE OF.**

See **STATUTE 37TH AND 38TH VIC., c. 64** (Evidence Further Amendment (Scotland) Act, 1874), p. 118.

„ **DEFORCEMENT**, p. 582.















